DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-5801	
Title	Ruben Flores-Villar, Petitioner v. United States
Docketed	August 11, 2009
Lower Ct.	United States Court of Appeals for the Ninth Circuit
Case Nos.	(07-50445)
Decision Date	August 6, 2008
Rehearing Denied	May 5, 2009
Questions Presented	

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 3 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 10, 2009)
Aug 19 2009	Waiver of right of respondent United States to respond filed.
Aug 27 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 15 2009	Response Requested. (Due October 15, 2009)
Oct 8 2009	Order extending time to file response to petition to and including November 16, 2009.
Nov 5 2009	Order further extending time to file response to petition to and including December 16, 2009.
Dec 16 2009	Brief of respondent United States in opposition filed.
Dec 31 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 7 2010	Reply brief requested. (Due January 21, 2010)
Jan 21 2010	Reply of petitioner Ruben Flores-Villar filed.
Feb 4 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 16 2010	DISTRIBUTED for Conference of February 26, 2010.
Mar 1 2010	DISTRIBUTED for Conference of March 5, 2010.
Mar 15 2010	DISTRIBUTED for Conference of March 19, 2010.
Mar 22 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Mar 30 2010	Motion to appoint counsel filed by petitioner Ruben Flores-Villar.
Apr 14 2010	Motion DISTRIBUTED for Conference of April 30, 2010.
Apr 20 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 18, 2010.
Apr 20 2010	The time within which to file respondent's brief on the merits is extended to and including August 27, 2010.
May 3 2010	Motion to appoint counsel filed by petitioner GRANTED. Steven F. Hubachek, Esquire, of San Diego, California is appointed to serve as counsel for the petitioner in this case.
Jun 18 2010	Brief of petitioner Ruben Flores-Villar filed.
Jun 18 2010	Joint appendix filed. (Statement of costs filed)

Jun 21 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent
Jun 24 2010	Brief amici curiae of Scholars on Statelessness filed
Jun 25 2010	Brief amici curiae of National Immigrant Justice Center and the American Immigration Lawyers Association filed
Jun 25 2010	Brief amici curiae of Professors of History, Political Science, and Law filed
Jun 25 2010	Brief amici curiae of National Women's Law Center, et al. filed
Jun 25 2010	Brief amici curiae of Equality Now, et al. filed
Jun 25 2010	Brief amici curiae of American Civil Liberties Union, et al. filed
Aug 20 2010	CIRCULATED
Aug 24 2010	SET FOR ARGUMENT ON Wednesday, November 10, 2010
Aug 27 2010	Brief of respondent United States filed. (Distributed)
Sep 2 2010	Brief amicus curiae of Immigration Reform Law Institute filed. (Distributed)
Sep 2 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 7 2010	Justice Kagan is recused in this case.
Sep 27 2010	Reply of petitioner Ruben Flores-Villar filed. (Distributed)
Oct 23 2010	Record for U.S.D.C. for the Southern District of California is electronic and available on PACER.
Nov 10 2010	Argued. For petitioner: Steven F. Hubachek, San Diego, Cal. (Appointed by this Court.) For respondent: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN FLORES-VILLAR,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN F. HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT'S DECISION IN *NGUYEN V. INS*, 533 U.S. 53 (2001), PERMITS GENDER DISCRIMINATION THAT HAS NO BIOLOGICAL BASIS?

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN FLORES-VILLAR,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Ruben Flores-Villar, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 6, 2008.

OPINIONS BELOW

On May 16, 2007, the district court published an opinion granting the government's motion in limine to exclude evidence regarding petitioner's claim to derivative United States citizenship at his trial on a charge of being a deported alien found in the United States in violation of 8 U.S.C. § 1326.[1] On August 6, 2008, the

---

[1] A copy of the Opinion, *United States v. Flores-Villar*, 497 F. Supp.2d 1160 (S.D. Cal. 2007) is attached as Appendix A.

Ninth Circuit issued an Opinion[2] affirming his conviction under section 1326. Petitioner's Petition for Rehearing and Rehearing En Banc was denied on May 5, 2009.[3]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution

> No person shall ... be deprived of life, liberty, or property, without due process of law.

8 U.S.C. § 1401(a)(7) (1974)

> a) The following shall be nationals and citizens of the United States at birth:
>
> ...
>
> (7) a person born outside the geographic limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

---

[2] A copy of the Opinion, *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), is attached as Appendix B.

[3] A copy of the order denying petitioner's petition for rehearing and rehearing en banc is attached hereto as Appendix C.

8 U.S.C. §§ 1409(a), (c)

> (a) The provisions of
>
> paragraphs (3) to (5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock ... if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.
>
> ...
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born ... outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

STATEMENT OF THE CASE

A. The Charges

On February 24, 2006, Petitioner was arrested in San Diego, California. *See Flores-Villar*, 536 F.3d at 994. The following day, Petitioner was charged with being a deported alien found in the United States after deportation. ERVol.II at 182.[4] Petitioner was indicted on a charge of violating 8 U.S.C. § 1326. *Id.* at 178-179.

---

[4] "ER" refers to the Excerpt of Record filed with the Court of Appeals.

Prior to trial, the government moved to exclude evidence of Petitioner's claims to derivative citizenship through his father. *See generally Flores-Villar*, 497 F. Supp.2d 1160. The district court granted the motion. *See id.*

Petitioner was tried on stipulated facts and found guilty of the section 1326 charge. *See Flores-Villar*, 536 F.3d at 994. He was convicted. *See id.*

B. Background

On February 24, 2006, Petitioner was arrested by border patrol in San Diego, California as he was waiting for the bus. ERVol.II at 182. Although Petitioner was born in Tijuana, Mexico, *id.* at 79-84, 109, his father, Ruben Trinidad Flores-Villar, is a United States citizen and has been since birth. *Id.* at 80-81. Petitioner's father also resided in the United States for at least ten years prior to Petitioner's birth. *Id.* at 80-81, 95. However, at the time Petitioner was born, his father was only sixteen years old. *Id.* at 55.

When Petitioner was only two months old, his father and his paternal grandmother (who is also a United States citizen since birth) brought him to the United States in order to receive medical treatment at University Hospital in San Diego. *Id.* at 81, 84, 109. Shortly thereafter, University Hospital sent a letter to the border authorities requesting a permit for Petitioner to enter the United States. *Id.* at 109. The letter was written on behalf of Petitioner's father. *Id.* At the time of his

release from the hospital, Petitioner's biological mother signed a form authorizing him to be released to his paternal grandmother for adoption planning. *Id.* at 111.

Petitioner grew up in the San Diego area with his father and his paternal grandmother and attended San Diego area schools. *Id.* at 80-84, 121-123. In fact, Petitioner had almost no contact with his biological mother. *Id.* at 80-81. Although Ruben Trinidad Flores-Villar is not listed on Petitioner's birth certificate, he formally recognized him as his son by filing an acknowledgment of paternity with the civil registry in Tijuana, Mexico in 1985, when Petitioner was eleven years old. *Id.* at 117-119. Petitioner's father also claimed Petitioner as his son on his income taxes. *Id* at 125-130.

On September 22, 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship. *Id.* at 55. On December 14, 2006, his application was denied. *Id.* The original opinion denying his application states:

> The fact of your legitimation is not in question. What is in question is whether or not your United States citizen father had the required physical presence in the United States prior to your birth in order for you to acquire United States citizenship . . .. Since you were born prior to November 14, 1986, your father must have been physically present in the United States for ten years. At least five of those years had to be after his fourteenth birthday. Since your father was only sixteen at the time of your birth, ***it is physically impossible for him to have [the] required physical presence necessary*** (five years after age fourteen) in order for you to acquire United States citizenship through him.

Id.

Prior to trial, the district court held several hearings at which Petitioner's citizenship defense was discussed. ERVol.I at 47, 72, 91, 155. The government filed a motion in limine seeking to preclude evidence of derivative citizenship, arguing that because it was physically impossible for Petitioner to present evidence that his father was physically present in the United States for at least 5 years after the age of 14, the court should preclude the defense. ERVol II at 142-150. Petitioner responded to the government's motion in limine and incorporated the arguments presented in his appeal from the district director's decision on his N-600 application by attaching a copy of that appeal. *Id.* at 23-141. Petitioner contended, *inter alia*, that the substantial residence requirement, which applied only to fathers, violated the Equal Protection guarantee of the Due Process Clause of the Fifth Amendment.

The district court issued a written, published decision granting the government's motion in limine. *See Flores-Villar*, 497 F. Supp.2d 1160. The district court declined to resolve what level of scrutiny applied to the Equal Protection claim, reasoning that the government would prevail under either approach. *See id.* at 1164. Noting that "special deference" to immigration statutes was required (even though it purported not to resolve the level of scrutiny issue), the district court recounted that the legislative history of the statute suggested that it was devised to avoid statelessness in foreign countries that would attribute the nationality of the mother to

a child born out of wedlock. *See id.* at 1165. The district court rejected the challenge on the theory that Congress's effort to avoid statelessness of the child by giving it the mother's nationality was a "bona fide reason[]." *See id.*

In light of the district court's pre-trial rulings, Petitioner elected to waive his right to a jury trial and instead consent to a bench trial. [ERVol.I at 6]. The district court found Petitioner guilty and denied his motion for a judgment of acquittal. *Id.* at 32-38. Petitioner' was sentenced to 42 months' custody and 3 years supervised release. *Id* at 2-3.

Petitioner appealed the district court's rulings precluding his defenses. Among other things, Petitioner argued that former sections 1401(a)(7) and 1409(a) of the Immigration and Nationality Act, as interpreted by the district court, discriminate against United States citizen fathers on the basis of gender, in violation of the Equal Protection guarantee of the Due Process Clause of the Fifth Amendment of the United States Constitution. The discrimination arose from the facts that an unwed father could pass United States citizenship to his child only if he resided in the United States for at least five years after his 14th birthday while an unwed mother needed to show only a continuous period of one year prior to the birth of the child. *See Flores-Villar*, 536 F.3d at 995.

The Court of Appeals rejected Petitioner's argument and affirmed his conviction, reasoning that although the precise question raised by Petitioner had not been addressed before, "the answer follows from the Supreme Court's opinion in *Nguyen v. INS*, 533 U.S. 53 (2001)." *See Flores-Villar*, 536 F.3d at 993.

> Avoiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests. The means chosen substantially further the objectives. Though the fit is not perfect, it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship.

Id. at 996. Although the panel claimed to be applying intermediate scrutiny, the panel did not cite any evidence that the alleged objectives were the actual objectives of the discriminatory scheme or that women suffered a disadvantage with respect to those objectives. Moreover, in attempting to bolster its analogy to *Nguyen*, the Court of Appeals observed that the residence differential is directly related to statelessness; the one year period applicable to unwed mothers seeks to insure that the child will have a nationality at birth." *See id.* at 997. But it also claimed that the discrimination "furthers the objective of developing a tie between the child, his or her father, and this country." *See id.* It did not explain how a U.S. residence requirement would affect the father/child relationship.

SUMMARY OF ARGUMENT

The former versions of 8 U.S.C. §§ 1401 and 1409 violated the guarantee of Equal Protection contained in the Due Process Clause of the Fifth Amendment because they imposed substantial residence burdens on the fathers of out-of-wedlock children born abroad as prerequisites to passing U.S. citizenship to the child while at the same time imposing only a minimal burden on similarly situated women. The prerequisites for men are so severe that it was impossible for Petitioner's father to qualify, yet Petitioner would be a citizen if his mother, not his father, had been a U.S. citizen. The Court of Appeals relied primarily on the Court's decision in *Nguyen*, 533 U.S. 53, but that case approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers. The Court should grant the petition and clarify the reach of *Nguyen*.

ARGUMENT

THE COURT SHOULD HOLD THAT *NGUYEN* DOES NOT PERMIT GENDER DISCRIMINATION THAT HAS NO BIOLOGICAL BASIS.

A. Unlike the Residence Requirement Here, Which Is Entirely Unrelated to Parenthood, *Nguyen* Addressed A Biologically-Based Distinction.

The Court's divided opinion in *Nguyen* does not resolve the question as to whether the gender discrimination worked by sections 1401(a)(7) and 1409, which has no basis in the biological differences between men and women, can survive scrutiny under the Equal Protection guarantee of the Due Process Clause. The issue in *Nguyen* was whether a requirement that a father, but not a mother, legitimate an out-of-wedlock child before the child's eighteenth birthday comports with Equal Protection. 533 U.S. at 69. The Court found that Congress sought to insure that all parents have the *opportunity* to establish a relationship with their out-of-wedlock children, but did not seek to guarantee the greater goal of ensuring establishment of an actual parent-child relationship. *Id.* at 64-65. Women, by virtue of delivering the child, are at an advantage with respect to the *opportunity* to form that bond — they necessarily have knowledge of the child's birth and thus the opportunity to form a parent-child relationship. *Id.* The legitimation requirement imposed on men, to be undertaken during the child's minority, compensates for that biological difference. *Id.* at 66. It ensures men have knowledge of the child's birth and the

opportunity to develop a relationship with the child. *Id.* at 66-67. Although petitioner argued that delivering a child does not ensure a parent-child relationship, that argument was not responsive to what the *Nguyen* Court found was the congressional goal: seeking to ensure only that each parent had an opportunity to form such a relationship. *Id.* at 69.

The Court of Appeals held that the Congressional goal identified in *Nguyen* was somehow similar to that sought by the instant statutory scheme. *See* 536 F.3d at 997. *Flores-Villar* correctly identified a crucial goal of the legislation in *Nguyen* as advancing the "'interest of ensuring at least an opportunity for a parent-child relationship to develop.'" *See id.* (quoting *Nguyen*, 533 U.S. at 69). The passage from *Nguyen* the Opinion quotes addressed the petitioners' argument that the legitimation requirements imposed only on men are unconstitutional because they do not guarantee that a mother will establish a relationship with her child, even though she will have knowledge that she has a child. *See Nguyen*, 533 U.S. at 69. *Nguyen* rejected the petitioners' argument because it confused fostering a relationship with the more modest goal of ensuring an opportunity to form one, *id.*, not because the over or under-inclusiveness of a statute is irrelevant to the Equal Protection analysis or because it would be proper to benefit or burden one gender. Although Congress could have required both men and women to show an actual parent-child relationship,

Congress ensured that men, like women, had the *opportunity* for a parent-child relationship to develop before conferring citizenship on the child. "Such an opportunity inheres in the event of birth in the case of a citizen mother and her child, but does not result as a matter of biological inevitability in the case of an unwed father." *See id.* at 54. Congress chose to remedy that lack of a "biological inevitability," but its means were not restrictive; Congress imposed minimal requirements on men to fulfill during the child's minority that women already met by virtue of delivering the child.

Part of *Nguyen*'s rationale for upholding the legitimation requirements was the fact that a person born to a citizen parent of either gender has the opportunity to acquire citizenship under the statutory scheme. *See Nguyen*, 533 U.S. at 62. It is physically possible for a child to derive citizenship from a citizen father, so long as a "minimal" effort is made to legitimate during minority. *Id.* at 70.

The same is not true with respect to the different residency requirements imposed on unmarried citizen fathers and mothers. As Petitioner's case establishes, despite his father's establishment and recognition of a parent-child relationship, it was physically impossible for Petitioner to derive citizenship from his father simply because his father was 16 years old when he was born. His father's age prevented conferring citizenship on Petitioner, even though Petitioner's biological mother took

no part in raising him. Had their roles been reversed, and Petitioner's mother was a young United States citizen and his father an alien, he would undoubtedly be a citizen, despite the lack of a relationship between Petitioner and his mother and regardless of her age. In sharp contrast to the "minimal" requirements at issue in *Nguyen*, Congress erected "unnecessary"[5]–often insurmountable–hurdles to the conferral of citizenship on the children of unmarried citizen fathers by requiring unmarried fathers, but not mothers, to establish 10 years' physical presence in the U.S. prior to the child's birth, at least 5 years of which must be after the father's fourteenth birthday. *See Nguyen*, 533 U.S. at 71 ("Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives.").

In contrast to *Nguyen*, by enacting different residency requirements for men and women, Congress did not further a gender-neutral goal through means that account for critical biological differences between the sexes. Nor did Congress

---

[5] Congress has acknowledged that there were no public policy considerations which preclude fathers who legitimate children born out-of-wedlock from passing citizenship to their children, confirming that the different residency requirements imposed on unmarried men and women by the 1940 Act were unnecessary. *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at V (House Comm. On Immigration and Naturalization 1939. The fact that Congress has since amended the law to alleviate the disparity, at least to a certain degree, is further evidence that the residency differential created by the 1940 Act was unnecessary. *See* 8 U.S.C. § 1401(g) (2008).

choose to advance an interest that is less demanding to satisfy than the alternatives or impose only minimal requirements on men. Assuming, as the panel did, that Congress was attempting to prevent statelessness, Congress chose means that were certain to advance that interest only as to the children of unmarried mothers. The children of young, unwed fathers received no protection from statelessness.

The same was not true in *Nguyen*. Although Congress only imposed legitimation requirements on men, women already had the opportunity to form a parent-child relationship with their children based on fundamental biological differences between the situation of mothers and fathers at the time of birth. The additional obligation imposed on men compensated for that biological difference — it ensured that men, like women, had knowledge of the child's birth at some point during the child's minority, and thus, the opportunity to form a relationship with the child. Thus, the objective was gender-neutral, and the means ensured that every parent, man or woman, had the opportunity to form a relationship with his or her child before granting that child citizenship.

The different residency requirements imposed on men and women do not do the same. Although the meager residency requirement applicable to unmarried mothers makes it easier for women to confer citizenship on their children, including any children who would otherwise be stateless, it does not make it any easier for men to confer citizenship. Unlike the fundamental biological difference between men and

women that guarantees that women will have knowledge of their child's birth, there is no fundamental difference between men and women that suggests that gender differences have anything to do with a parent's ties to the United States. In other words, while a mother's delivery of a child supports an inference that she has at least had an opportunity to form a relationship with the child, nothing about motherhood says anything about the woman's relationship to the United States. The differing residency requirements have no biological basis.

Moreover, the statutory scheme leaves the children of unwed U.S. citizen fathers at the mercy of the laws of foreign countries. There is a risk that a child born abroad to a citizen father, like a citizen mother, will be stateless. While Congress may have eliminated that risk as to children born abroad to citizen mothers, there is no comparable provision to ensure that children born abroad to citizen fathers will have a nationality. Thus, in contrast to the requirements in *Nguyen*, Congress did not elect to advance an interest that is less demanding for men to satisfy than some other alternative. The statutory scheme does not directly and substantially ensure that all children born abroad to a U.S. citizen parent will have a nationality—it only helps women. The objective, to help only U.S. citizen mothers, is not valid. It is also impossible for some men, like Petitioner's father to satisfy, not merely less demanding.

In short, unlike the distinctions upheld in *Nguyen*, the residency differential is not based on any innate biological differences between men and women. Likewise, there is no gender-specific connection between the length of a parent's residence in the U.S. prior to the child's birth and either the biological relationship between the parent and child or the likelihood that the parent will foster the "real, everyday ties that provide a connection between child and citizen parent . . .." *Id.* at 65. In fact, residency in the United States has no logical relationship to a parent's relationship to a child. The exaggerated residence requirement imposed even on men who, like Petitioner's father, have unquestionably established paternity, is completely divorced from the fundamental biological truths that animated *Nguyen*, and its predecessor, *Miller v. Albright*, 523 U.S. 420 (1998). *Nguyen* thus undermines, rather than supports, the Opinion.

B. The Purported Goals Were Not the Actual Purpose of the Statutory Scheme and the Gender Benefitted (Women) Did Not Actually Suffer a Disadvantage.

For a gender-based classification to withstand equal protection review, the government must "establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982). *See also United States v. Virginia*, 518 U.S. 515, 533 (1996) (the justification "must be genuine, not hypothesized or invented *post hoc* in

response to litigation.") The gender benefitted by the classification must "actually suffer a disadvantage related to the classification." *Id.* at 728.

The Opinion does not require the government to prove that the alleged objective (preventing statelessness) was the actual purpose of the legislation or that women actually suffer a disadvantage related to the classification (that women had more stateless children than men). Rather, it simply cites the government's argument that "avoiding stateless children is an important objective that is substantially furthered by relaxing the residence requirement for women because many countries confer citizenship based on bloodline (*jus sanguinis*) rather than, as the United States does, on place of birth (*jus soli*)." *Flores-Villar*, 536 F.3d at 996.

The legislative history demonstrates that the more lenient residency requirement for women was based on stereotypes about who will raise, nurture and be responsible for a child born out of wedlock, and thus which parent's values the child will adopt, not an effort to prevent statelessness. First, a 1939 report accompanying the proposed legislation explains, with regard to the provision regarding conferral of citizenship on the children of unmarried mothers, "Under American law 'the mother has a right to the custody and control of such a child as against the putative father and is bound to maintain it as its natural guardian.'" *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at V (House Comm. On Immigration and

Naturalization 1939). It further states that "[t]he mother, as guardian by nurture, has the right to custody and control of her bastard child until it attains an age when it can, in contemplation of the law, make an election between father and mother." *Id.* Citizenship law "is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *See Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting).

> Under this law, as one advocate explained to Congress in a 1932 plea for a sex-neutral citizenship law, "when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background."

Id. (citation omitted). Prevention of statelessness was thus not the actual purpose; Congress acted to reinforce stereotypic gender roles with regard to nonmarital children.

In addition to the legislative reports, the effect of the legislation suggests that the prevention of statelessness was not its actual purpose. The Nationality Act of 1940 imposed, for the first time, strict residency requirements on the children of U.S. citizen fathers, yet exempted unmarried women from those requirements. Strict residency requirements on men increased the risk of statelessness on the part of their out-of-wedlock children. Congress did this despite the fact that the 1939 report indicated that there were no considerations of public policy which support precluding fathers who legitimate out-of-wedlock children from passing citizenship along to

their children. *See Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at V (House Comm. On Immigration and Naturalization 1939). The increase in the risk of statelessness, at least for children of U.S. citizen fathers, suggests that the prevention of statelessness was not the actual purpose of the legislation.

There is no empirical evidence that women had significantly more stateless children than men. Rather than require the government to present evidence that women actually suffered a disadvantage, the Court of Appeals disregarded petitioner's examples[6] of countries in which the children of unwed citizen fathers would be stateless, noting only that "we do not expect statutory classifications always to be able to achieve the ultimate objective." *See Flores-Villar*, 536 F.3d at 996.

---

[6] In Iran, for example, an illegitimate child born to an Iranian mother and a father who is not an Iranian citizen is regarded by the Iranian authorities as having the same nationality as the father, not the mother. UNICEF, *Birth Registration in Iran: An Analysis of the state of relevant laws in Iran*, p. 8 (July 2005). Therefore, under the Congressional scheme, a child born out of wedlock to a United States citizen father and an Iranian woman would be stateless. It appears that this would be the case with respect to children born out of wedlock in other countries as well. *See* Human Rights Watch, *The Bedoons of Kuwait: Citizens Without Citizenship*, p. 103 (Aug. 1995) ("Kuwait's Citizenship Law denies children the right to Kuwaiti citizenship if their fathers were foreign or Bedoon."); *see also* William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, Vol. 45, The American Journal of International Law, No. 3, 476, 479 (Jul. 1951), ("In Belgium, Czechoslovakia, and Poland, the nationality of the child follows the father's upon legitimation . . .").

While that may be true, the more lenient residency requirement for women never achieves the alleged ultimate objective of avoiding statelessness as to the out-of-wedlock children of U.S. citizen men.

The Court rejected a similar one-gender-benefits plan in *Virginia*,

> A purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant plan-a plan to "affor[d] a unique educational benefit only to males." However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.

518 U.S. at 539-540. If the actual purpose of the liberal residency requirement applicable to unwed mothers was statelessness prevention, it is clearly designed only to help prevent women from having stateless children, not preventing statelessness generally. To paraphrase the Court's holding, it is not equal protection to devise a plan that protects the United States' daughters' out-of-wedlock children, "but makes no provision whatever for her [sons]," *see id.*, such as Petitioner's who was flatly precluded from passing citizenship to his son because of his gender and his age. Regardless of how the law serves the children of unwed mothers, it fails to serve the children of unwed fathers.

C. The Secondary Goal Found By the Opinion (But Not Urged By the Government) is Itself Discriminatory, in Violation of *Mississippi University of Women* and *Virginia*.

The Court of Appeals added a second justification, not urged by the government—the statute assures that there is a link between the father and the out-of-

wedlock child and this country, a link not required of a mother. *See Flores-Villar*, 536 F.3d at 997. This purpose is itself discriminatory; it requires only one gender to establish this link. And, as noted before, there is no biological basis from which Congress could have concluded that women would be more adept at forming ties to the United States.

It is constitutionally impermissible for Congress to pursue an objective that is itself discriminatory. *See Mississippi University of Women*, 458 U.S. at 725 ("[I]f the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."). *See also Virginia*, 518 U.S. at 532 (Equal Protection principle is offended when a law or official policy denies to one sex, such as women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities); *id.* at 539-540 (concluding that VMI's mission to produce men prepared for leadership in civilian life and in military service afforded unique educational benefits only to males, and thus, regardless of how "liberally" the plan served men, it made no comparable provision for women). *Mississippi University of Women* and *Virginia* thus stand for the proposition that not even laudable goals permit discriminatory purposes.

The imposition of a burden or a benefit on one gender therefore cannot constitute an important governmental interest. Consequently, assuring a link between this country and an unwed citizen father of an out-of-wedlock child, but not a mother, is not an important governmental interest.

D. The Means are Not Substantially and Directly Related to the Purported Problem.

To comport with equal protection principles, there must be an "exceedingly persuasive justification" for a gender-based classification. *See Mississippi University for Women*, 458 U.S. at 731. The classification must be substantially and directly related to an actual problem, which Congress was actually attempting to solve. *See id.* at 728-730.

A law may still violate equal protection principles, even where there is empirical evidence demonstrating a disparity between the situation or behavior of males and females. *See Craig v. Boren*, 429 U.S. 190 (1976). For example, *Craig* found that evidence showing that 2% of males between 18 and 21 years of age were arrested for drunk driving in comparison to only .18% of women in that age group was insufficient to justify a prohibition on the sale of 3.2% alcohol to men under age 21.

> While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly, if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'" Indeed,

> prior cases have consistently rejected the use of sex as a decision making factor even though the statute in question certainly rested on far more predictive empirical relationships than this.

Id. at 201-202. To withstand Equal Protection review, gender must represent a legitimate and accurate proxy. *Id.* at 204. Because the statistical evidence offered was insufficient to show that sex was a legitimate, accurate proxy for the regulation of drinking and driving, the Court found that the statute invidiously discriminated against males between 18-20 years of age. *Id.*

Similarly, *Caban v. Mohammed*, 441 U.S. 380 (1979) found that a New York law which allowed unmarried mothers but not unmarried fathers to block the adoption of illegitimate children by withholding consent was not substantially related to the State's interest in promoting the adoption of illegitimate children. *Id.* at 382, 389-91. The Court emphasized that a gender-based classification "Must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Id.* at 391.

The Court recognized that the State's interest in providing for the well-being of illegitimate children is an important one. *See id.* But, the Court stated, "the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction." *See id.* In *Caban*, as in *Craig*, the Court looked to the poor fit between the gender-based classification and

the purported objective, noting the over-inclusiveness and under-inclusiveness of the law. *See id.* at 394 ("In sum, we believe that § 111 is another example of 'over-broad generalizations' in gender-based classifications"). The Court noted that the law "exclude[d] some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enable[d] some alienated mothers arbitrarily to cut off the paternal rights of fathers." *Id.* In effect, it discriminated against unwed fathers even when their identity was known, paternity was established, and they had manifested a significant paternal interest in the child. *See id.* In light of the broad application of the law in all circumstances, the Court found that the law did not bear a substantial relationship to the State's asserted interests. *See id.*

The Court of Appeals ignored these well-established legal principles and upheld former sections 1401(a)(7) and 1409 despite the poor fit between the means and the proffered goal. Instead of requiring the government to show an "exceedingly persuasive justification," i.e., empirical evidence of real, non-trivial differences between the rate of stateless children born abroad to unmarried men and women, directly related to the residence requirement, the panel simply concluded that there was a "sufficiently persuasive" justification for the discriminatory classification because the more lenient residency requirement "seeks to insure the child will have a nationality" and that men who have children abroad have ties to this country. *See Flores-Villar*, 536 F.3d at 997.

The Court of Appeals' conclusion that the requirement sought to prevent statelessness misses the point. Even if the actual purpose of the requirement was to prevent statelessness (and no evidence supports that), showing a legitimate purpose is insufficient to show that there is a direct *and* substantial relationship between the classification and the asserted goal. As *Craig* and *Caban* make clear, the fact that a gender-based classification may sometimes achieve a lofty goal (prevent drunk-driving, facilitate adoption, or prevent a child from being stateless) does not render the classification constitutional. Although the fit need not be perfect, to withstand the Equal Protection Clause, sex must represent a legitimate and accurate proxy for statelessness. *See Craig*, 429 U.S. at 204. The classification must rest upon some ground of difference having "a fair and substantial relation" to the prevention of statelessness so that all persons similarly circumstanced shall be treated alike. *See Caban*, 441 U.S. at 391.

Gender is not an accurate proxy for statelessness. There is a risk that children born abroad to both unmarried men and unmarried women will be stateless. Yet, the degree of discrimination caused by former sections 1401(a)(7) and 1409 is significantly more marked than the discrimination at issue in *Craig*, 429 U.S. 190. Under former sections 1401(a)(7) and 1409, an unmarried woman need only establish one year of physical presence in the U.S. to confer citizenship on her child. Thus, any woman of child bearing age has the opportunity to confer citizenship on her child,

regardless of whether the child would otherwise be stateless. In contrast, under former sections 1401(a)(7) and 1409, it is physically impossible for an unmarried man under age 19 to confer citizenship on his child, regardless of whether his child would be stateless. In short, even assuming there is some difference between the rate of stateless children born to unmarried women and men, the discriminatory classification at issue here does not have "a fair and substantial relation" to the asserted objectives and doesn't insure that all persons similarly circumstanced shall be treated alike. See *Caban*, 441 U.S. at 391. Thus, the gender based differential contained in former sections 1401(a)(7) and 1409 constitutes a denial of equal protection of the laws.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

Date: March 22, 2010

STEVEN F. HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008
Telephone: (619) 234-8467
Attorneys for Petitioner

OPPOSITION BRIEF

No. 09-5801

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN FLORES-VILLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's inability to claim derivative citizenship through his United States citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers, see former 8 U.S.C. 1401(a)(7) and 1409 (1970), violated the equal-protection guarantee of the Fifth Amendment's Due Process Clause and afforded petitioner a defense to criminal prosecution under 8 U.S.C. 1326.

IN THE SUPREME COURT OF THE UNITED STATES

No. 09-5801

RUBEN FLORES-VILLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 536 F.3d 990. The order of the district court granting the government's motion in limine (Pet. App. A1-A7) is reported at 497 F. Supp. 2d 1160.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2008. A petition for rehearing was denied on May 5, 2009 (Pet. App. C1). The petition for a writ of certiorari was filed on August 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted of illegal reentry after having been removed, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 42 months of imprisonment. The court of appeals affirmed. Pet. App. B.

1. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has opted to confer United States citizenship by statute on certain persons born outside of the United States or its outlying possessions through various provisions in the Immigration and Nationality Act (INA). At the time of petitioner's birth in 1974, a child born outside the United States to married parents, only one of whom was a United States citizen, could acquire citizenship through his or her United-States-citizen parent if, before the child's birth, the citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned fourteen years of age. 8 U.S.C. 1401(a)(7) (1970).[1] The same residency requirement applied if the

---

[1] Section 1401 has since been amended, with former Section 1401(a)(7) redesignated as Section 1401(g) and the term of the required residence in the United States reduced to a total of five years, two of which must be after the parent turned fourteen. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3657. That amendment does not apply unless the child was born on or after November 14, 1986, however, and thus

child's parents were not married to each other and the father was a United States citizen, although the father in such a case must take additional steps to establish his paternity. 8 U.S.C. 1409.[2]

---

does not govern petitioner's citizenship claim. See Pet. App. A4, citing Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 23(d), 102 Stat. 2609. At the time of petitioner's birth in 1974, Section 1401 provided, in relevant part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (7) a person born outside the geographic limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

8 U.S.C. 1401(a)(7) (1970). Unless otherwise specifically stated, references herein to Section 1401(a)(7) pertain to this provision in the 1970 version of the INA.

[2] Section 1409(a) sets forth the following additional requirements where the father is the citizen parent and the mother is an alien:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years --
>
> (A) the person is legitimated under the law of the person's residence or domicile,

If, however, the child was born outside the United States to unmarried parents and only his mother was a United States citizen, Section 1409(c) allows the child to claim United States citizenship through his mother as long as the mother was a citizen of the United States at the time of the child's birth and had been physically present in the United States (or a United States possession) before the child's birth for a continuous period of at least one year.[3] See Miller v. Albright, 523 U.S. 420, 430 (1998).

2. In 1974, petitioner was born to unwed parents in Tijuana, Mexico. Pet. App. A2, B6. His mother was a citizen and national of Mexico and his father, who was 16 at the time of petitioner's birth, was a United States citizen. Id. at A2-A3, B6. When petitioner was two months old, his father and paternal grandmother brought him to the United States to receive medical treatment. Id.

> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

In addition, Section 1409(a) incorporates by reference, as to the citizen parent, the residency requirement of Section 1401.

[3] 8 U.S.C. 1409(c) provides:

> (c) Notwithstanding the provision of subsection (a) of this section, a person born * * * outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

at A3. After petitioner was released from the hospital, he lived with his father and grandmother in the San Diego area, where he grew up. Id. at A3, B6. Although petitioner's father is not listed on his birth certificate, in 1985 he acknowledged petitioner as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico. Id. at A3, B6.

On March 17, 1997, petitioner was convicted of importation of marijuana in violation of 21 U.S.C. 952 and 960. Pet. App. B6. Thereafter, petitioner was removed from the United States pursuant to removal orders on multiple occasions. Ibid. Petitioner repeatedly returned to the United States following removal, resulting in additional removal proceedings on two occasions in 1999 and again in 2002. Ibid. In June 2003, following another illegal reentry, petitioner was convicted of two counts of illegal entry into the United States in violation of 8 U.S.C. 1325, after which he was removed in October 2003. Ibid. Petitioner again entered the United States illegally and was yet again removed in March 2005, after which he unlawfully returned to the United States one more time. Ibid.

3. On February 24, 2006, petitioner was arrested and charged with being a deported alien found in the United States after deportation, in violation of 18 U.S.C. 1326(a) and (b). Pet. App. B6. After being indicted, petitioner filed an application for a "Certificate of Citizenship" with the federal government, claiming that he had acquired United States citizenship through his father.

Ibid. Petitioner's application was denied because it was physically impossible for petitioner's father, who was 16 when petitioner was born, to have been present in the United States for five years after his fourteenth birthday at the time of petitioner's birth, as required by Section 1401(a)(7) in order to be eligible to confer his citizenship on petitioner. Id. at B6-B7.

Before petitioner's trial on the illegal-reentry charge, the government filed a motion in limine to exclude evidence of petitioner's purported derivative citizenship because petitioner did not qualify for derivative citizenship under the INA. Pet. App. A3, B6-B7. The district court granted the motion after finding that no reasonable juror could find that petitioner could establish derivative citizenship through his father because his father had failed to satisfy the transmission-of-citizenship requirements of the INA. Id. at A3. The district court also rejected petitioner's equal protection challenge to Section 1401(a)(7)'s residency requirements. Id. at A5-A7. Following a bench trial on stipulated facts, petitioner was convicted of violating 8 U.S.C. 1326 by illegally entering the United States without permission after having been removed, and he was sentenced to 42 months of imprisonment. Id. at B7; Pet. 7.

4. The court of appeals affirmed. Pet. App. B1-B12. On appeal, petitioner reasserted his argument that the version of Section 1401(a)(7) applicable at the time of his birth violated the equal-protection component of the Fifth Amendment's Due Process

Clause because it (in conjunction with Section 1409(a)) required a citizen father of a child born out of wedlock outside of the United States to have lived in the United States for five years following his fourteenth birthday before he could transmit his citizenship to his child while a citizen mother in such a situation need only have resided in the United States for a continuous period of one year. The court of appeals rejected petitioner's argument, relying in part on this Court's holding in Nguyen v. INS, 533 U.S. 53 (2001), that Section 1409 of the INA does not discriminate on the basis of gender in violation of equal-protection principles by requiring citizen fathers -- but not citizen mothers -- to take steps to legitimate their children born out of wedlock outside the United States before conferring their citizenship on those children. Pet. App. B7-B10.

The court of appeals reasoned that the differential treatment of citizen fathers and citizen mothers in such cases was substantially related to the important government interest in avoiding stateless children because many countries confer citizenship based on bloodline rather than on place of birth. Pet. App. B8-B9. Thus, the court held, applying a more lenient residency rule to unwed citizen mothers than to fathers survived intermediate scrutiny. Id. at B8-B10.[4] The court rejected petitioner's argument that the scheme was rendered unconstitutional

[4] Because of that conclusion, the court did not decide whether a lesser standard of review would be appropriate for gender classifications made in the immigration context. Pet. App. B7-B8.

because Iran applies a different rule governing citizenship, assigning to a child born out of wedlock to an Iranian mother and non-Iranian father the citizenship of the child's father. As the court explained, "[a]voiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests" and "[t]he means chosen substantially further th[os]e objectives." Pet. App. B9. "Though the fit is not perfect," the court of appeals concluded, "it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship." Ibid.[5]

ARGUMENT

Petitioner asks this Court to review of the court of appeals' rejection of his equal-protection challenge to the residency requirements formerly applicable to citizen fathers of children born out of wedlock outside the United States under 8 U.S.C.

---

[5] The court of appeals also rejected petitioner's argument that former Section 1401(a)(7) unconstitutionally discriminates on the basis of age between men younger than 19 years old and similarly situated men older than nineteen because it was impossible for United States citizen fathers younger than 19 to confer citizenship upon their foreign-born, children born out of wedlock. Pet. App. B10. Petitioner does not renew his age-based equal-protection claim in this Court. Nor does petitioner seek further review of the court of appeals' rejection of his arguments that Sections 1401 and 1409 violate substantive due process; that Section 1401(a)(7) should have been interpreted to count his grandmother's residence in the United States; and that, even if he is not a citizen, he should have been permitted to assert as a defense to the illegal reentry charge that he believed he was a United States citizen. Id. at B10-B12.

1401(a)(7) (1970). Further review of that decision is not warranted, however, because it does not conflict with any decision of this Court or of any other court of appeals, because it is correct, and because it concerns a statute that has been materially amended.

1. Petitioner does not assert that the court of appeals' decision conflicts with any decision of this Court or of any other court of appeals. Indeed, he fails to identify any other court that has even considered whether the former Section 1401(a)(7) violates equal-protection principles. That alone is a sufficient reason to deny the petition for a writ of certiorari.

2. The equal-protection issue raised by petitioner also does not merit review because it does not appear that petitioner has prudential standing to raise that issue. This Court has held that one party to a lawsuit may assert the constitutional rights of a third party who is absent from the litigation if, but only if, the litigant has suffered an injury in fact, the litigant has a "close relation" to the party whose rights are asserted, and there is "some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 411 (1991); see also, e.g., Miller v. Albright, 523 U.S. 420, 445-451 (1998) (O'Connor, J., concurring in the judgment); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623-624 n.3 (1989); Singleton v. Wulff, 428 U.S. 106, 112-116 (1976) (opinion of Blackmun, J.); Warth v. Seldin, 422 U.S. 490, 499-500 (1975);

McGowan v. Maryland, 366 U.S. 420, 429-430 (1961). Those prudential restrictions "arise[] from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" Miller, 523 U.S. at 446 (O'Connor, J., concurring in the judgment) (quoting Singleton, 428 U.S. at 113-114 (opinion of Blackmun, J.)).

Although the court of appeals held that petitioner did not have standing to assert other constitutional rights on behalf of his father, Pet. App. B10, the court rejected his equal-protection challenge to Section 1401(a)(7) without discussing whether he had standing to assert it. Petitioner does not argue that the country's derivative citizenship rules discriminate against him because he is a man. Rather, he argues that the rules treat citizen fathers of out-of-wedlock children less favorably than they treat citizen mothers of such children in violation of the equal-protection guarantee of the Due Process Clause. That is a challenge properly raised by petitioner's father, who is the subject of the allegedly unconstitutional differential treatment. As the court of appeals found, because "the record discloses no obstacle that would prevent [petitioner's father] from asserting his own constitutional rights," petitioner "lack[ed] standing to pursue rights that belong to his father." Pet. App. B10.

3. Review by this Court is also not warranted because the court of appeals' decision is correct. Section 309 of the INA,

8 U.S.C. 1409, prescribes the terms on which a United States citizen parent may transmit his or her citizenship to a child born outside the United States and out of wedlock. In Nguyen v. INS, 533 U.S. 53 (2001), this Court held that the requirement that citizen fathers -- but not citizen mothers -- undertake certain steps to establish the paternity of such children before their eighteenth birthday as a prerequisite to conferring citizenship upon such children did not violate equal-protection principles.[6] Although gender-based classifications are generally subject to an intermediate form of equal-protection scrutiny, as this Court noted Nguyen and as the court of appeals below noted, it is an open question whether a more lenient form of scrutiny should apply when a statute implicates Congress's immigration and naturalization power. Id. at 61; Pet. App. B8 n.2. As the United States urged in Nguyen and below, the exceptionally deferential standard that this Court has traditionally applied in reviewing congressional enactments in the unique context of legislation governing matters of immigration and nationality should apply in challenges such as this one. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 587-589 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 711-

---

[6] The Court had previously granted certiorari in Miller to consider the same question, but a majority opinion did not emerge on the constitutionality of the provisions in question in that case. See Nguyen, 533 U.S. at 58.

713 (1893). As was the case in Nguyen, however, the provision challenged in this case passes even a more stringent level of review.

As the court of appeals correctly held, the differential treatment of citizen mothers and citizen fathers of out-of-wedlock children born outside the United States to one non-citizen parent is substantially related to achieving at least two important governmental objectives: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent -- and thus to the United States -- to justify the conferral of citizenship on them; and second, preventing such children from being stateless. Pet. App. B9.

At the time of petitioner's birth, children born outside of the United States to one citizen parent and one non-citizen parent generally could derive citizenship from the citizen parent only if that parent had resided in the United States for a minimum of ten years, at least five of which were after attaining the age of 14. 8 U.S.C. 1401(a)(7) (1970). That rule applied to children of married parents regardless of which parent was a United States citizen and to children of unmarried parents if the father was a United States citizen and established his paternity while the child was a minor. 8 U.S.C. 1401(a)(7), 1409(a) (1970). That general rule furthers the government's substantial interest in ensuring that there is a link between an unwed parent and his or her country

on one side and the child who is to become a United States citizen on the other. See Nguyen, 533 U.S. at 68 (recognizing Congress's "desire to ensure some tie between this country and one who seeks citizenship"); see also Rogers v. Bellei, 401 U.S. 815, 833-834 (1971) (noting that Congress has historically been concerned with a potential citizen's physical presence in the United States as a condition precedent to conferring citizenship).

Applying one uniform rule to all children born abroad to one citizen parent and one non-citizen parent, regardless of whether the parents were married, would have been a permissible means of pursuing the government's strong interest in extending the privileges of citizenship only to children whose citizen parents had substantial ties to the United States. Congress opted, however, to relax the residency requirement in the case of an unwed citizen mother who has a child abroad out of concern that such children could otherwise be rendered stateless. The United States has always applied the rule of "jus soli, that is, that the place of birth governs citizenship status except as modified by statute." Bellei, 401 U.S. at 828. Many other nations, however, apply the civil-law rule of jus sanguinis, under which citizenship is acquired principally based upon the blood relationship with a parent. See authorities cited in Miller, 523 U.S. at 477 (Breyer, J., dissenting). When the President in 1938 submitted to Congress a proposed revised immigration code, the Administration surveyed the citizenship laws of other nations and discovered that, in

approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 431 (printed 1945); see Durward V. Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 258-259 (1935). Against the background of the American rule of jus soli, the result of these jus sanguinis laws was to create a risk of statelessness among the foreign-born children of unwed United States citizen mothers. Thus, unless the law of the United States accommodated the jus sanguinis rules of other nations, those children would not be citizens of any nation. As the court of appeals noted, "[t]he residence differential" in citizenship law between unwed mothers and fathers "is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth." Pet. App. B9.

Petitioner conceded below that preventing stateless children is a legitimate governmental objective, Pet. App. B9, and he does not appear to challenge that proposition in his petition. Instead, he continues to argue (Pet. 13-15) that the means Congress chose to achieve this purpose -- i.e., relaxing the residency requirement only for unwed citizen mothers who give birth abroad -- is an

unconstitutional denial of equal protection because it is underinclusive. Specifically, petitioner argues (Pet. 15) that the citizenship scheme at issue is unconstitutional because it does not "ensure that all children born abroad to a U.S. citizen parent will have a nationality -- it only helps women." But, as discussed above, the risk that a child who is born abroad to unmarried parents will be rendered stateless is much higher when his mother is a United States citizen. Petitioner's identification of one country -- Iran -- that assigns to a child born out of wedlock the father's nationality rather than the mother's does not undermine the legitimacy of Congress's scheme. Indeed, the lack of other contrary examples reinforces the close fit between Congress's important interest and the means it employed to serve that interest.[7]

4. In addition, further review is not warranted because even if this Court did find that the statutory scheme established by Sections 1401(a)(7) and 1409 violates the equal-protection component of the Fifth Amendment, it could not grant petitioner citizenship. See United States v. Cervantes-Nava, 281 F.3d 501 (5th Cir. 2002) (rejecting equal-protection challenge to 8 U.S.C. 1401(a)(7) physical-presence requirements because, even if

---

[7] Petitioner notes (Pet. 19 n.6) that some other countries refuse to grant citizenship to a child born to a citizen mother and a non-citizen father. But it is not clear that the examples he cites are relevant to the challenge he raises in his petition because he does not contend that those countries apply that rule where the child's parents are unmarried.

offending provisions were found to be unconstitutional, court's only options would be to strike the more lenient provision applicable to citizen mothers); see also INS v. Pangilinan, 486 U.S. 875, 883-885 (1988) (where Congress has set specific statutory limits on a provision for naturalization, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations"); Miller v. Albright, 523 U.S. 420, 452-459 (1998) (Scalia, J., concurring in the judgment) (concluding that a court lacks the power to confer citizenship on a foreign-born individual in the absence of a statute that provides for citizenship, even as a remedy for a constitutional infirmity in the citizenship statute itself); id. at 451 (O'Connor, J., concurring in the judgment) (citing Justice Scalia's opinion and acknowledging the "potential problems with fashioning a remedy").

5. Finally, review by this Court is not appropriate in this case because Congress amended the provisions in question more than 20 years ago to ameliorate some of the burdens that stem from the relevant residency requirement that was applicable to unwed fathers, married fathers, and married mothers. In 1986, Congress amended Section 1401(a)(7) to reduce a citizen parent's physical presence requirement in the United States or its outlying possessions to a total of five years, only two of which are required to be after the parent had obtained the age of 14.

Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653 § 12, Nov. 14, 1986, 100 Stat. 3657 (amending redesignated Section 1401(g)). The amended version of the statute applies to children born on or after November 14, 1986. See Pet. App. A4, citing Immigration Technical Corrections Act of 1988, Pub. L. 100-525 § 23(d), 102 Stat. 2609. The current version of Section 1401 maintains the reduced physical-presence requirement adopted in 1986. 8 U.S.C. 1401(g) (2006). Although the current version of the law continues to apply a less stringent residency requirement to unwed citizen mothers who give birth abroad, the shortened residency requirement otherwise applicable to mixed-citizen parents, whether married or unmarried, substantially eliminates the risk petitioner identifies that young fathers -- such as petitioner's own father -- will be physically unable to satisfy the residency requirements applicable to them if they father a child before the age of 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

LANNY A. BREUER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

DECEMBER 2009

REPLY BRIEF

No. 09 5801

IN THE

SUPREME COURT OF THE UNITED STATES

RUBEN FLORES-VILLAR,

PETITIONER,

vs -

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

STEVEN F. HUBACHEK
ELIZABETH M. BARROS
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Attorneys for Petitioner

I.

INTRODUCTION

The versions of 8 U.S.C. §§ 1401 and 1409 applied to Petitioner violate the Fifth Amendment's guarantee of Equal Protection because they impose substantial residence burdens on the fathers of out-of-wedlock children born abroad as prerequisites to passing U.S. citizenship to their children while at the same time imposing only a minimal burden on similarly situated women. Because of that gender-based discrimination, which lacks any biological basis, Petitioner's attempt to defend against the alienage element of the reentry after deportation charge[1] filed against him failed. Because the Ninth Circuit misapplied *Nguyen v. INS*, 533 U.S. 53 (2001), specifically, and the Court's Equal Protection jurisprudence, generally, Petitioner seeks the Court's review.

The Solicitor General urges the Court to deny the petition on four primary grounds. She claims Petitioner lacks standing, the Ninth Circuit correctly rejected Petitioner's claim, courts cannot remedy Equal Protection violations in statutes addressing citizenship arising at birth, and the statutory scheme at issue here has been amended to discriminate to a lesser degree. Her objections lack merit.

A majority of the Court has rejected the Solicitor General's narrow view, Opp. at 9-10, that Petitioner cannot urge a claim based upon gender discrimination leveled

---

[1] *See* 8 U.S.C. § 1326(a).

at his father that resulted in denial of Petitioner's claim to U.S. citizenship. *See Miller v. Albright*, 523 U.S. 420, 432-33 (1991) (Op. of Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-74 (Breyer, J., dissenting). Moreover, the Court has repeatedly found standing where criminal defendants, such as Petitioner, assert constitutional issues arising in the context of an ongoing prosecution. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 410-16 (1991).

On the merits, the Solicitor General contends that the discriminatory scheme survives intermediate scrutiny because the differential residence requirements advance two legitimate goals. First, she contends that the differential residence requirement ensures links between the unwed parent, the child, and the United States. Opp. at 12-13. Her argument is frivolous: there is no basis for believing that men and women are not equally adept at forming such connections.

Second, she contends that the discrimination was designed to avoid statelessness. That contention is no basis for denying the petition. The Solicitor General has not met her burden to demonstrate that avoidance of statelessness was the actual purpose of the discrimination. *See Nguyen*, 533 U.S. at 76 (O'Connor, J., dissenting). Nor has she demonstrated that the children of unwed women are disproportionately in danger of statelessness. Finally, even if there were a correlation

between gender and grossly increased risk of statelessness, it lacks the "tighter fit between means and ends" required by the Court's cases. *See id.* at 78.

The Solicitor General's claim that courts cannot grant citizenship, Opp. at 15-16, counsels in favor of granting the writ as the Solicitor General has no response to Justice O'Connor's analysis in *Nguyen*, 533 U.S. at 94-97, and the Court has never resolved the tension between her opinion and Justice Scalia's contrary view set forth in his concurring opinion in *Miller*, 523 U.S. at 452-59. The instant case offers an opportunity to resolve that question.

Finally, the Solicitor General's contention that the Court should deny review because the new scheme does not discriminate so harshly as the old one, Opp. at 16-17, is insubstantial. *See Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) ("the absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law") (citation, internal quotations omitted).

II.

PETITIONER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE USED TO DENY HIM CITIZENSHIP AND IMPRISON HIM.

The Solicitor General contends Petitioner lacks standing to contest the sex-discrimination worked by sections 1401 and 1409 that made it impossible for his

unwed father to convey citizenship to him because of the father's gender. *Opp.* at 9-10 (citing *Miller*, 523 U.S. at 445-51 (O'Connor, J., concurring)). She is mistaken.

First, Justice O'Connor's views on standing were rejected by a majority (seven Justices) of the *Miller* Court. *See* 523 U.S. at 432-33 (Op. of Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-74 (Breyer, J., dissenting). Specifically, the Court looks to three factors in evaluating third party standing:

> a party can "assert" the constitutional rights of another person ... where (1) that party has "suffered an 'injury in fact'"; (2) the party and the other person have a "close relationship"; and (3) "there was some hindrance" to the other person's "asserting" his "own rights."

Id. at 473 (Breyer, J., dissenting) (quoting *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998)). Petitioner, who has been both denied citizenship and imprisoned based upon an offense for which alienage is an element, plainly has "suffered an 'injury in fact'" and he enjoys a "'close relationship'" with his father. *See id.*[2] *See also id.* at 432-33 (Op. of Stevens, J.); *Breyer v. Meissner*, 214 F.3d 416, 423 (3d Cir. 2000).

The only question is whether "'there was some hindrance' to petitioner's father[]'s 'asserting' his 'own rights.'" *See id.* As a practical matter, petitioner's claim arises out of a criminal prosecution; his father could not intervene to assert his own rights. Such practical considerations are plainly relevant to the hindrance issue, as

---

[2] Petitioner's father sought to testify on petitioner's behalf, but his testimony was excluded. Excerpt of Record (on file with the Ninth Circuit Court of Appeals) Vol. I at 98 (explaining that the father would travel to testify at the trial).

Justice Breyer's dissenting opinion in *Miller* demonstrates. *See id.* at 474 (relying upon considerations of complexity of the litigation and its expense). Indeed, Justice Scalia pointed out that Justice O'Connor's reading of the Court's "hindrance" cases is unfounded. *See id.* at 454 n.1 (Scalia, J., concurring) ("I do not read our cases as demanding as significant an impairment of the rightholder's ability to sue as [Justice O'Connor] does."). In short, the Solicitor General's claim that petitioner lacks standing is insubstantial.

Second, the Court has repeatedly found standing where criminal defendants assert constitutional issues arising in the context of an ongoing prosecution. *See, e.g., Powers*, 499 U.S. at 410-16 (asserting the rights of excluded jurors); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (defendant prosecuted as distributor of contraceptive entitled to assert the rights of unmarried persons denied access to contraceptives). *Powers* and *Baird* strongly suggest that petitioner has standing here. Indeed, the relationship between petitioner and his claims and the interests of his father is far more substantial than those at issue in *Powers* and *Baird*.

Finally, the Solicitor General's position raises serious questions of fairness. Petitioner did not choose to initiate the instant litigation; he is an unwilling participant. The government chose to charge him with a serious crime, a felony, an element of which is that he must be an alien. *See* 8 U.S.C. § 1326(a). Having

charged Petitioner with such an offense, and invoked the jurisdiction of the courts to try and imprison him, the Solicitor General should not be heard to argue that petitioner lacks standing to pursue the issues intimately connected with his defense.

III.

THE SOLICITOR GENERAL'S DEFENSE OF THE INSTANT GENDER DISCRIMINATION DEMONSTRATES THE NECESSITY OF THE COURT'S REVIEW TO CLARIFY THE APPLICABILITY OF INTERMEDIATE SCRUTINY AND THE GOVERNMENT'S BURDEN TO DEMONSTRATE COMPLIANCE WITH THE FIFTH AMENDMENT GUARANTEE OF EQUAL PROTECTION.

The Solicitor General urges the Court to deny the petition because she asserts the Ninth Circuit's decision was correct. None of her defenses of the lower court's decision are persuasive.

The Solicitor General notes that the Court has simply assumed, not held, that intermediate scrutiny applies to gender discrimination in statutes addressing citizenship, and cites cases involving other immigration issues for the proposition that deference is required. Opp. at 11. Justice O'Connor refuted that argument in her *Nguyen* dissent, explaining that *Nguyen*, like the instant case, "is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place." 533 U.S. at 96. Because the Solicitor General does not address Justice O'Connor's argument, her contention provides no basis for denying the petition.

On the merits, she contends that former sections 1401 and 1409 survive higher scrutiny because "the differential treatment of citizen mothers and citizen fathers of out-of-wedlock children born outside the United States" is justified as "first, ensuring [that the child] attained a sufficiently recognized or formal relationship to their United States parent -- and thus to the United States ... and, second, preventing such children from being stateless." Opp. 11. The former contention is frivolous, the "differential treatment" here -- requiring a much shorter residence period for women -- bears no rational relationship to the goal of ensuring "a sufficiently recognized or formal relationship to their United States parent -- and thus to the United States."

As to the latter, the Solicitor General offers no more than her *ipse dixit*, Opp. at 13-14, that avoiding statelessness, rather than, say, perpetuating gender stereotypes as to the care of our-of-wedlock children,[3] was the actual motivation for the discrimination. She relies heavily on the President's 1938 message to Congress, yet that document does not mention statelessness, although it is replete with stereotypes about the rights and duties of women with respect to illegitimate children. *See Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Session, Pt. 1 at 18.

---

[3] *See, e.g., Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting).

Because the government must "establish that the alleged objective is the actual purpose underlying the discriminatory classification," *see Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982), the Solicitor General is obliged to prove that avoiding statelessness was the actual motivation for the discrimination. Neither the Solicitor General nor the lower court, *see United States v. Flores-Villar*, 536 F.3d 990, 996-97 (9th Cir. 2008), meet that burden, they simply assume it is so.

Assuming, arguendo, that the Solicitor General correctly identified the Congressional goal, the discrimination here is not justified. The Solicitor General cites to a "survey" submitted to Congress in 1938 indicating that "in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother." Opp. at 13-14 (citing *inter alia* Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935)). Based upon this statement, she asserts that "the result of these *jus sanguinis* laws of other nations was to create a risk of statelessness among the foreign-born children of unwed citizen mothers" and thus, "unless the law of the United States accommodated the *jus sanguinis* rules of other nations, those children would not be citizens of any nation." *Id.* at 14.

The materials cited by the Solicitor General do not, however, conclude that unwed mothers suffer, compared to unwed fathers, a grossly disproportionate risk that

their children born abroad would be stateless. Rather, she simply infers it. Her assumption is unwarranted. Because "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality," 29 Amer. J. Int'l Law at 258-259, their appears to be a significant risk of statelessness whenever the father has recognized or legitimated the child, yet cannot demonstrate compliance with the more onerous residence requirements applicable to men. Moreover, a more recent survey of citizenship laws confirms that in approximately 39 countries, a child born out of wedlock is considered a citizen of the father's country unless (in approximately 30 countries) the identity of the father is unknown. *See Citizenship Laws of the World*, U.S. Office of Personnel Management (March 2001), available at http://www.opm.gov/EXTRA/INVESTIGATE/is-01.PDF (last visited Jan. 21, 2010) (providing a country-by-country analysis).[4] Thus, the children of unmarried

---

[4] It appears from the 2001 survey that a child born out of wedlock to a U.S. citizen father would be stateless in the following countries: Algeria (unless father unknown), Bangladesh (unless father unknown), Bhutan, Botswana, Brunei Darussalam, Cameroon (unless father unknown), Cyprus (unless father unknown), Djibouti (unless father unknown), Egypt (unless father unknown or stateless), Germany (unless father unknown), Greece (unless father unknown), Guinea (unless father unknown), Iran, Japan (unless father unknown), Jordan, Kiribati (unless father unknown), Kuwait (unless father unknown), Lebanon, Maldives (unless father unknown), Monaco (unless father unknown), Morocco (unless father unknown), Myanmar (unless father unknown), Namibia (unless father unknown), Oman, Papua New Guinea, Qatar, Rwanda (unless father unknown), Senegal (unless father unknown), Seychelles (unless father unknown), Sierra Leone, Sudan (unless born prior to 1957 and parents had established residence in Sudan), Swaziland, Sweden (unless father unknown), Syria (unless father unknown), Taiwan (unless father

fathers may bear the risk of statelessness in those countries. Because the Government must justify the discrimination, *see United States v. Virginia*, 518 U.S. 515, 533 (1996), the Solicitor General's showing of a disproportionate risk borne by unwed mothers is inadequate.

Indeed, the Solicitor General appears to shirk that burden. She agrees with Petitioner that Iran imposes the father's nationality, but insists that his example "does not undermine the legitimacy of Congress's scheme" and that "the lack of other examples reinforces the close fit between Congress's important interest and the means it employed to serve that interest." Opp. 15. But it is the Solicitor General who bears the burden, *see Virginia*, 518 U.S. at 533, and criticizing Petitioner's showing without affirmatively demonstrating that the children of unmarried men face only a trivial risk of statelessness cannot discharge that burden. Because she has not provided that affirmative demonstration, she has not proved a grossly disproportionate risk of statelessness suffered by unwed mothers. The discrimination is therefore unjustified.

Even if the Solicitor General did prove a significant risk differential, the lower court still erred in approving the discrimination because it lacks the requisite "fit." *See Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) ("Because we require a much

---

unknown), Togo (unless father unknown), United Arab Emirates (unless father unknown), Vanuatu (until age 18 when child can apply for citizenship), Yemen (unless father unknown).

tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification") (citations omitted). *Accord Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000). *See also Craig v. Boren*, 429 U.S. 190, 200 (1976) (requiring that "the gender-based distinction closely serve[]" the legitimate objective). The Solicitor General has made no showing as to the proportion of out-of-wedlock births as to which there is a risk of statelessness. Yet the statutory scheme imposes its residence differential in every out-of-wedlock birth abroad in which the mother is a United States citizen. Thus, women are favored over men even in cases where there is no risk of statelessness. And in cases where there is a risk of statelessness, women are again favored even though the Solicitor General does not deny that there will be cases in which the out-of-wedlock children of U.S. citizen fathers will be stateless.

The Solicitor General believes that the discrimination is justified because the stateless children of U.S. citizen men will be a small percentage of the total births and, presumably, that justifies discriminating against men even when statelessness is not an issue. But that reasoning echoes the statistical analyses rejected in *Craig*, where the Court overturned gender-based limitations on the ability of young men to purchase beer imposed because, *inter alia*, men of that age group were arrested for alcohol-related offenses more often than similarly situated women, and were involved

in more alcohol-related traffic accidents. *See* 429 U.S. at 200-01. *Craig* rejected that evidence as not meeting the "requirement that the gender-based difference be substantially related to achievement of the statutory objective." *Id.* at 204.

Here, statelessness is an issue in some unknown proportion of out-of-wedlock births, and the Solicitor General contends that the percentage of that group of births involving U.S. citizen mothers exceeds that of U.S. fathers by some unknown amount. Nothing about these unknown percentages serves to distinguish *Craig*'s rejection of statistical analyses. The Solicitor General has not demonstrated that the Court should deny the petition because the lower court's decision was correct.

IV.

AS JUSTICE O'CONNOR EXPLAINED IN *NGUYEN*, THIS COURT HAS THE POWER TO REMEDY THE INSTANT EQUAL PROTECTION VIOLATION, AND, TO THE EXTENT THAT THIS COURT'S REMEDIAL POWER IS IN DOUBT, THAT DOUBT MILITATES IN FAVOR OF GRANTING THE PETITION TO RESOLVE THE QUESTION.

The Solicitor General contends that further review is unwarranted because, even in the event of a constitutional violation, this Court cannot grant Petitioner citizenship. Opp. at 15. Justice O'Connor's dissent in *Nguyen*, 533 U.S. at 94-97, reaches the opposite conclusion, and the Solicitor General has no response to her analysis. *See also Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting). Specifically, Justice O'Connor reasoned that because section 1409 is not a naturalization statute,

INS v. Pangilinan, 486 U.S. 875 (1988), which the Solicitor General relies upon, Opp. at 16, is inapposite. *See Nguyen*, 533 U.S. at 95-96 (O'Connor, J., dissenting). Like the claimant in *Nguyen*, Petitioner seeks not naturalization, but rather to resolve "whether citizenship was transmitted at birth." *Id.* As for the remedy, Justice O'Connor observed that "this Court has often concluded that, in the absence of legislative direction not to sever the infirm provision, 'extension, rather than nullification,' of a benefit is more faithful to the legislative design." *Id.* at 96 (quoting *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979)) (additional citations omitted). Indeed, the Solicitor General's position here, that Congress's goal was to ameliorate statelessness, Opp. at 12, would support "extension [of the benefit], rather than nullification." *See Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting).

The Solicitor General places primary reliance on *United States v. Cervantes-Nava*, 281 F.3d 501 (5th Cir. 2002). Opp. at 15, but *Cervantes-Nava* rejected a similar claim to that advanced by Petitioner without addressing Justice O'Connor's *Nguyen* opinion or her citation to *Westcott*.[5] Rather, *Cervantes-Nava*, which involved a challenge to the fact that the residence requirement for married mothers exceeded that of unmarried mothers, concluded that the only potential remedies were to "sever the more lenient residency requirement for citizen mothers of illegitimate

---

[5] Additionally, *Cervantes-Nava* conflicts with *Wauchope v. United States Department of State*, 985 F.2d 1407, 1410 (9th Cir. 1993).

children or [to] strike down the INA in its entirety." 281 F.3d at 504. Because *Cervantes-Nava* overlooks the third course identified by Justice O'Connor's *Nguyen* dissent and set forth in *Westcott*, it not only fails to support the Solicitor General's position, it also affirmatively demonstrates that the Court should grant the petition to resolve this difficult question.

Nor does the Solicitor General's citation, Opp. at 16, to Justice Scalia's concurring opinion in *Miller*, 523 U.S. at 452-59, counsel in favor denying the petition. In *Nguyen*, Justice Scalia reaffirmed his views expressed in *Miller*, 533 U.S. at 73 (Scalia, J. concurring), but noted that a majority of the Justices in *Miller* "concluded otherwise" there and "proceed[ed] on the same assumption" in *Nguyen*. *Id.* As a result, Justice Scalia joined the *Nguyen* merits opinion and declined to respond to Justice O'Connor's remedial analysis in *Nguyen*. The upshot is that the debate is unresolved, and the instant case offers an ideal opportunity to settle it.

V.

THE FACT THAT THE SUCCESSOR STATUTES DISCRIMINATE LESS HARSHLY IS NO REASON TO DENY THE PETITION.

The Solicitor General observes that Congress amended the relevant provisions to discriminate less harshly, but concedes that "the current version of the law continues to apply a less stringent residence requirement to unwed citizen mothers who give birth abroad." Opp. at 16-17. Because "the absence of an insurmountable

barrier will not redeem an otherwise unconstitutionally discriminatory law," *Kirchberg*, 450 U.S. at 461, the amendment is no reason to deny the instant petition.

VI.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Dated: March 22, 2010

STEVEN F. HUBACHEK
ELIZABETH M. BARROS
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Attorneys for Petitioner

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUN 18 2010
OFFICE OF THE CLERK

No. 09-5801

In The
Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

NEAL KATYAL*
Acting Solicitor General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
Telephone: (202) 514-2217
Supremectbriefs@usdoj.gov
Attorney for Respondent
**Counsel of Record*

REUBEN CAMPER CAHN
STEVEN F. HUBACHEK*
ELIZABETH M. BARROS
VINCENT J. BRUNKOW
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Steven_Hubachek@fd.org
Attorneys for Petitioner
**Counsel of Record*

Petition For Writ Of Certiorari Filed: August 3, 2009
Petition For Writ Of Certiorari Granted: March 22, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

191 541

TABLE OF CONTENTS

Page

Docket Sheets, Southern District of California 1

Docket Sheets, Court of Appeals for the Ninth Circuit 4

Superseding Indictment, January 9, 2007 5

Government's Motion *in Limine* to Preclude Evidence of Derivative Citizenship, March 23, 2007 7

Defendant's Response in Opposition to the Government's Motion *in Limine* to Preclude Evidence of Derivative Citizenship, March 26, 2007 24

Decision of the Administrative Appeals Office, March 29, 2007 111

Excerpts of Transcript of Motion Hearing, March 29, 2007 122

Decision of the Administrative Appeals Office, April 2, 2007 126

Opinion of the District Court Granting Motion *in Limine* to Preclude Evidence Re: Derivative Citizenship, May 16, 2007 135

Stipulations, June 12, 2007 147

Excerpts of Transcript of Motion Hearing/ Bench Trial, June 12, 2007 152

Judgment, October 5, 2007 158

Notice of Appeal, October 5, 2007 167

Published Opinion of the Court of Appeals, August 6, 2008 169

U.S. District Court
Southern District of California (San Diego)
CRIMINAL DOCKET FOR CASE #:
3:06-cr-00592-BTM All Defendants

03/22/2006 5 INDICTMENT by USA. Counts filed against Ruben Flores-Villar (1) count 1. Any XT1 excludable that extends beyond the indictment date is terminated at the point of indictment. (cag) (Entered: 03/24/2006)

03/23/2007 40 MOTION in limine to Preclude *Evidence of Derivative Citizenship* by United States of America as to Ruben Flores-Villar. (Attachments: # 1 Exhibit) (McFadden, Christopher) (Entered: 03/23/2007)

03/26/2007 43 RESPONSE in Opposition by Ruben Flores-Villar *re* 40 MOTION in limine to Preclude *Evidence of Derivative Citizenship* (Attachments: # 1 Exhibit # 2 Proof of Service) (Barros, Elizabeth) (Entered: 03/26/2007)

03/29/2007 46 Proposed Jury Instructions by Ruben Flores-Villar (Attachments: # 1 Proof of Service) (Barros, Elizabeth) (Entered: 03/29/2007)

03/30/2007 49 NOTICE *of Filing of Administrative Decision* by United States of America as to Defendant Ruben Flores-Villar, Plaintiff United States of America (Attachments: # 1 Exhibit) (McFadden, Christopher) (Entered:

03/30/2007)

04/02/2007 50 NOTICE *of Filing of Second Administrative Decision* by United States of America as to Defendant Ruben Flores-Villar, Plaintiff United States of America (Attachments: # 1 Exhibit) (McFadden, Christopher) (Entered: 04/02/2007)

04/18/2007 52 NOTICE *of Filing of Legislative History Documents* by United States of America as to Defendant Ruben Flores-Villar, Plaintiff United States of America (Attachments: # 1 Exhibit 1# 2 Exhibit 2) (McFadden, Christopher) (Entered: 04/18/2007)

05/16/2007 54 ORDER granting 40 Motion in Limine to Preclude Evidence Re: Derivative Citizenship as to Ruben Flores-Villar (1). Signed by Judge Barry Ted Moskowitz on 5/16/07. (vet,) (Entered: 05/16/2007)

06/12/2007 58 Minute Entry for proceedings held before Judge Barry Ted Moskowitz :Bench Trial begun on 6/12/2007 as to Ruben Flores-Villar (1) Count 1s. Day of Trial 1. Swore witnesses. Exhibits marked/received. Deft oral motion for acquittal is denied. The Court finds Ruben Flores-Villar guilty as charged in the one count superceding indictment. Sentence With Probation Office Report set for 9/12/2007 09:00 AM in Courtroom

		15 before Judge Barry Ted Moskowitz. (Court Reporter Diane Berger).(Plaintiff Attorney AUSA, William Hall).(Defendant Attorney Elizabeth Barros, FD). (tml) (Entered: 06/13/2007)
06/12/2007	59	WAIVER of Right to Trial by Jury by Ruben Flores-Villar. (vet,) (Entered: 06/14/2007)
06/12/2007	60	NOTICE of Stipulations by Ruben Flores-Villar. (vet,) (Entered: 06/15/2007)
10/05/2007	72	JUDGMENT as to Ruben Flores-Villar (1), Count(s) 1s, Custody of BOP for a term of 42 Months. The remaining counts are dismissed on the motion of the United States. Supervised Release 3 Years. Assessment $100.00. No fine. Signed by Judge Barry Ted Moskowitz on 10/5/07. (vet)(bar). Modified on 10/9/2007 – edited text (vet,). (Entered: 10/05/2007)
10/05/2007	73	NOTICE OF APPEAL by Ruben Flores-Villar re 72 Judgment, (Filing fee: No fee required) (leh) (Entered: 10/09/2007)

United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 07-50445
USA v. Flores-Villar

08/06/2008	18	FILED OPINION (CYNTHIA HOLCOMB HALL, PAMELA ANN RYMER and ANDREW J. KLEINFELD) AFFIRMED. FILED AND ENTERED JUDGMENT. (RP)
05/05/2009	26	Filed order (CYNTHIA HOLCOMB HALL, PAMELA ANN RYMER and ANDREW J. KLEINFELD) Judge Rymer and Judge Kleinfeld voted to deny appellant's petition for rehearing en banc. Judge Hall so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration. The petition for rehearing en banc is DENIED. (WL)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

January 2006 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. RUBEN FLORES-VILLAR, Defendant.	Criminal Case No. 06CR0592BTM INDICTMENT **(Superseding)** (Filed Jan. 9, 2007) Title 8, U.S.C., Secs. 1326(a) and (b) – Deported Alien Found in the United States

The grand jury charges:

On or about February 24, 2006, within the Southern District of California, defendant RUBEN FLORES-VILLAR, an alien, who previously had been, excluded, deported and removed from the United States to Mexico, was found in the United States, without the Attorney General of the United States or his designated successor, the Secretary of the Department of Homeland Security (Title 6, United States Code, Sections 202(3) and (4), and 557), having expressly consented to the defendant's reapplication for admission into the United States; in violation of Title 8, United States Code, Sections 1326(a) and (b).

It is further alleged that defendant RUBEN FLORES-VILLAR was removed from the United States subsequent to March 17, 1997.

DATED: January 9, 2007.

A TRUE BILL:

/s/ Ellen M. Bach
Foreperson

CAROL C. LAM
United States Attorney

By: /s/ William A. Hall
WILLIAM A. HALL JR.
Assistant U.S. Attorney

KAREN P. HEWITT
United States Attorney
CHRISTOPHER R. MCFADDEN
California State Bar No. 246625
Assistant U.S. Attorney
Edward J. Schwartz Federal Building
880 Front Street #6293
San Diego, CA 92101
Telephone: (619) 557-7031
christopher.mcfadden@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RUBEN FLORES-VILLAR, Defendant.	) Criminal Case No. 06CR0592-BTM)) GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF DERIVATIVE CITIZENSHIP)) (Filed Mar. 23, 2007)

NOW COMES plaintiff United States of America, by and through its attorneys, United States Attorney Karen P. Hewitt and Assistant U.S. Attorney Christopher R. McFadden, and hereby files this Motion In Limine to Preclude Evidence of Derivative

Citizenship. This memorandum is based on the files and the pleadings in this case.

I

STATEMENT OF FACTS

Ruben Flores-Villar, the defendant, was born on October 7, 1974. He was born out of wedlock in Tijuana, Mexico. The defendant's biological mother is a citizen and national of Mexico. His biological father, Ruben T. Floresvillar, was born on December 25, 1957. The father, like his son, was born in Mexico. In the 1970s, the father served roughly two years in federal prison for alien smuggling and was deported from the United States on several occasions before realizing that he had a possible claim to American citizenship. Since the father's mother (the defendant's grandmother) was a United States citizen, a Certificate of Citizenship was issued to the father in May 1989, and thus, under the law, he has been an American citizen since birth. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005).

When the defendant was born in October 1974, his father was 16 years old. It is undisputed that, at the time of the defendant's birth, the father could not have been physically present in the United States for five years after reaching the age of 14, as required by 8 U.S.C. § 1401(g) and § 1409(a). Rather, the father only was present in the United States for less than three years.

For purposes of this motion, the United States assumes that the defendant was legitimated by his father during the 1980s. The father received the defendant into the home, owned by the grandmother, where the father typically stayed when he was inside the United States. The father also filed an acknowledgment of paternity with the Tijuana civil registry in 1985. The United States denies that the defendant's father was physically present in the United States for ten years prior to the defendant's birth in October 1974 and reserves the right to contest this issue if the Court denies this motion *in limine*.

II

ARGUMENT

Defendant wishes to present a derivative citizenship claim to the jury. Because he cannot satisfy the transmission-of-citizenship requirements of 8 U.S.C. § 1409(a) and § 1401(c), the United States asks the Court to exclude such evidence under Rules 401 and 403 of the *Federal Rules of Evidence*. Such evidence would be irrelevant and confuse the issues, needlessly prolong the trial, and prejudice the United States.[1]

---

[1] *See United States v. Pina-Jaime*, 332 F.3d 609, 611-12 (9th Cir. 2003) (barring evidence of one-day visa to enter United States when defendant had never filed I-212 application); *United States v. Ibarra*, 3 F.3d 1333, 1334 (9th Cir. 1993),

(Continued on following page)

A. THE DEFENDANT CANNOT MEET THE 5-YEAR RESIDENCE REQUIREMENT UNDER 8 USC §1401(g) AND § 1409(a)

The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). "Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress." *Miller v. Albright*, 523 U.S. 420, 424 (1998). "No alien has the slightest right to naturalization unless all statutory requirements are complied with," *United States v. Ginsberg*, 243 U.S. 472, 475 (1917), and the Court has "specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent." *Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (emphasis added).

The Immigration Nationality Act ("INA"), 8 U.S.C. § 1401 *et seq.*, governs the transmission of citizenship. In cases where a child is born out of wedlock to a citizen father, § 1409(a) refers back to § 1401. Irrespective of whether the child is born to a married or unmarried couple, § 1401(g) states that

---

overruled on limited and unrelated grounds by United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996) (barring irrelevant evidence of prior legal status and citizenship of family members); *see also United States v. Serna Vargas*, 917 F. Supp. 711, 712 (C.D. Cal. 1996) (same for evidence of "*de facto* citizenship" that did not satisfy statutory criteria)

the following persons, if born outside the United States, shall be American citizens:

> A person born outside of the geographical limits of the United States and its outlying possessions of parents, one of whom is an alien, and the other a citizen of the United State who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, *at least five of which were after attaining the age of fourteen*.

8 U.S.C. § 1401(g) (codified at 8 U.S.C. § 1401(a)(7) at the time of the defendant's birth and subsequently amended in 1986 and 1988) (emphasis added).[2]

In this case, it is undisputed that the defendant's father was merely sixteen years old at the time when Defendant was born out-of-wedlock in Mexico. As such, it is impossible for the father to have transmitted citizenship to the defendant. *See Palomo v. Mitchell*, 361 F. Supp. 455, 456 (S.D. Tex. 1972), *aff'd sub nom. Palomo v. Kleindeinst*, 474 F.2d 1345 (5th Cir. 1973) ("[The] statute would require that one of the plaintiff's parents have had five years

---

[2] At the time of the defendant's birth, § 1401(g) was codified at 8 U.S.C. § 1401(a)(7). *See Tullius v. Albright*, 240 F.3d 1317, 1320 (11th Cir. 2001). When referring to the residency requirements applicable to the defendant, this brief's citations to § 1401(g) should be understood as citing the provisions of § 1401(a)(7) that govern the defendant's instant claim.

residence in the United States after attaining the age of sixteen years and prior to plaintiff's birth. Since plaintiff was born prior to her father having attained the age of twenty-one years, it is impossible for these statutory requirements to be satisfied."); *Ruiz v. INS*, 410 F.2d 382, 383 (6th Cir. 1969) (per curiam) (same); *see also Uribe-Temblador v. Rosenberg*, 423 F.2d 717, 717 (9th Cir. 1970) (per curiam) ("Petitioner's road to citizenship would be open if the mother had had five out of ten years residence in the United States *after* she reached 16 years of age.") (emphasis added).

The defendant argues that the father transmitted citizenship under the current version of § 1401(g), which was enacted in 1986 and amended in 1988. Those amendments shortened the residency requirements to a total of five years, two of which were after the parent turned fourteen. (Exhibit 1 at 4-8). Defendant's argument fails. Because a person derives citizenship at birth, Defendant's instant claim is governed by the law in effect when he was born on October 7, 1974 – not any subsequent version of the Act. *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); *Runnett v. Schultz*, 901 F.2d 782, 783 (9th Cir. 1992); *Rodriguez-Romero v. INS*, 434 F.2d 1022, 1023 (9th Cir. 1970). Accordingly, since this case is controlled by the Act as it existed in 1974, nothing in the 1986 or 1988 amendments "took away [t]he defendant's] vested right to citizenship" or acted in any impermissible fashion, as the defendant has mistakenly claimed. (Exhibit 1 at 6). Cases such as

St. Cyr v. INS, 533 U.S. 289, 315 (2001), simply have no bearing in this matter.

B. THE COURT CANNOT IMPUTE THE RESIDENCE OF DEFENDANT'S GRANDMOTHER TO THE FATHER IN ORDER TO SATISFY THE 5-YEAR REQUIREMENT

Defendant wishes for the Court to construe § 1401(g) "to impute the residence of a citizen grandparent to a citizen father who has a child out-of-wedlock while still a minor." (Exhibit 1 at 9). Because the defendant's grandmother lived in the United States for at least five years after turning fourteen, during which time the defendant's father was a minor, the defendant argues that his father, too, should be considered as having resided in the United States for more than five years after his fourteenth birthday (*Id.*). While this is a creative argument, it defies the terms of the statute and is wholly unprecedented.

Under the Act, "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise*." 8 U.S.C. § 1421(d) (emphasis added), Section 1401(g), which is part of the same subchapter as § 1421(d), provides for the transmission of citizenship by "parents" – not grandparents – who have been "physically present in the United States" for "not less than ten years, at least five of which were after attaining the age of

fourteen." "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation" of the limits set by Congress. *INS v. Pangilinan*, 486 U.S. 875, 885 (1988). In that regard, with respect to the 10-year provision of § 1401(g), the Ninth Circuit has repeatedly refused to invoke equitable principles and rewrite the statute for persons who cannot meet the Act's requirements. *See Runnett v. Schultz*, 901 F.2d 782, 784 (9th Cir. 1992); *Rodriguez-Romero v. INS*, 434 F.2d 1022, 1024 (9th Cir. 1970) (per curiam). This Court should do the same.

Defendant's reliance on *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), and *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994), is misplaced. (Exhibit 1 at 9-11). The Ninth Circuit has recognized the difference between "citizenship retention cases" and "citizenship transmission cases." *Rennett*, 901 F.2d at 784. *Cuevas-Gaspar* and *Lepe-Guitron* are citizenship retention cases that interpret the residence requirement in connection with lawful permanent residents seeking § 212(c) relief or discretionary post-deportation relief. By contrast, this is a citizenship transmission case where the defendant is asking the Court to transmit citizenship in violation of the statute. The Ninth Circuit has frowned upon requests like Defendant's, which seek to expand the language of § 1401(g) beyond its literal terms, and stated that "courts have traditionally hesitated to find that Congress could take away citizenship

without the citizen's consent." *Rennett*, 901 F.2d at 784 (citing *Rogers v. Bellei*, 401 U.S. 815, 821-22 (1971)). "This concern has led to the application of constructive residence in order to preserve an individual's retention of citizenship. Similar concern, however, could not exist for the transmission of citizenship where citizenship is simply not being conferred." *Id.*

The right of citizenship is "a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), and "Congress has a completely free hand in defining citizenship as it relates to persons born abroad." *United States v. Trevino-Garcia*, 440 F.2d 368, 369 (5th Cir. 1971) (citing *Uribe Temblador v. Rosenberg*, 423 F.2d 717, 717 (9th Cir. 1970)). Consistent with this precedent, the clear language of §§ 1421(d) and 1401(g), and the long-standing rule that courts must respect Congress's judgment with respect to matters of conferring citizenship, the Court should reject Defendant's arguments.

C. DEFENDANT'S EQUAL PROTECTION CLAIMS ARE WITHOUT MERIT

Defendant's final two arguments are that the Act violates the Equal Protection Clause because it invidiously discriminates on the basis of gender, (Exhibit 1 at 11-20), and on the basis of age. (Exhibit 1 at 21). Defendant recognizes that his argument is inconsistent with the logic of *Nguyen v. INS*, 533 U.S. 53 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998),

if not their holdings, and his effort to distinguish these cases fall short.

1. A Heightened Standard of Review Does Not Apply to Gender-Based Classifications Related to Immigration and Naturalization

The Government disagrees with the defendant's claim that the gender-based distinction in the residency requirements for men, *see* §§ 1409(a), 1401(g), and women, *see* § 1409(c), must satisfy "intermediate scrutiny." (Exhibit 1 at 12). "Deference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'" *Miller*, 523 U.S. at 434 n.11 (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)); *id.* at 434 (searching only for "irrational discrimination"). Congressional power is at its height, and the scope of judicial review is at its zenith, with respect to matters concerning immigration, alienage, and citizenship. *Fiallo v. Bell*, 430 U.S. 787, 791-93 (1977). In exercising its broad powers under Article 1 § 8 of the Constitution "to establish uniform rules for naturalization," Congress "regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 792 (quoting *Mathews*, 426 U.S. at 80). Thus, the Court has declined to hold that heightened scrutiny of gender-based classifications is required in immigration cases. *See Nguyen*, 533 U.S. at 61; *Miller*, 523 U.S. at 434 n.11; *United States v. Barajas-Guillen*,

632 F.2d 749, 752 (9th Cir. 1980) (applying rational-basis review). Nonetheless, even if greater scrutiny is warranted, the disparate residency requirements of § 1401(g) and § 1409(c) satisfy the Equal Protection Clause for they are substantially related to important governmental objectives.

2. The Residency Requirements Do Not Impermissibly Discriminate Based on Gender

As noted previously, 8 U.S.C. § 1409(a) – which governs out-of-wedlock births involving citizen fathers – refers back to the requirements under 8 U.S.C. § 1401 regarding transmission of citizenship. Under § 1401(g) – which facially applies both to married and unmarried couples who bear children outside of the United States – an illegitimate child whose mother is not a citizen will not acquire citizenship from the father unless the father meets the residency requirements of § 1401(g). In this case, those requirements were ten years of physical presence in the United States, at least five of them attaining after the age of sixteen. On the other hand, an illegitimate child claiming citizenship through a citizen mother under § 1409(c) need only show that the mother was "physically present in the United States . . . for a continuous period of one year" prior to the child's birth.

The residency requirement applicable to citizen fathers under § 1409(a), who have an illegitimate

child, is the same as the rule that applies under § 1401(g) to either a citizen father or citizen mother who has a child outside of the United States while married to a non-citizen spouse. Thus, § 1409(a) does not impose on illegitimate children born outside the United States any requirement that is more onerous than the norm. Rather, the shorter residency requirement in § 1409(c) applies a special, unusually generous rule to the children of citizen mothers who give birth abroad and out of wedlock.

The Act was intended to "carry out the principle of equality between men and women in the matter of nationality" while balancing the need to insure some genuine and substantial connection to the United States beyond a mere blood relationship with a parent.[3] Proposed Code at 10-11, 14. It was important to Congress that the children be "truly American in character," have "American sympathies," and "bring up their children as Americans." *Id.* at 11, 14. The Act's legislative history reveals at least two reasons for the separate residency requirements for male and

[3] The legislative history is contained in *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong., 1st Sess., at V (House Comm. on Immigration and Naturalization (1939) [hereinafter "the Proposed Code"]. The Proposed Code is the result of a direction by President Roosevelt to the Secretary of State and the Secretary of Labor (who then had jurisdiction over the Immigration and Naturalization Service) and the Attorney General "to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to Congress." *Id.*

female parents, who have children out of wedlock, to transmit citizenship.

First, the drafters' commentary reflects an expectation that a citizen mother would likely have custody of any out-of-wedlock child born outside the United States. Proposed Code at 18. This expectation is borne out by census data showing that mother-child families account for 85 percent of single-parent households with minor children.[4] Such children would likely be raised primarily by their single mother – who, by definition, would be an American citizen. *See Miller*, 523 U.S. at 438 ("[w]hen a child is born out of wedlock outside of the United States, the citizen mother . . . typically will have custody of the child immediately after the birth" and the child "has the opportunity to develop ties with its citizen mother at an early age"). Thus, in terms of likely American acculturation, the situation would be similar to that of a child living abroad with parents, both of whom being citizens, and there would be little reason to require anything more than the minimal prior parental residence required in the case of married citizen couples pursuant to § 1401(c), *i.e.*, *any* prior residence in the United States.[5]

[4] *See, e.g.*, U.S. Dep't of Commerce, Bureau of the Census, *Current Population Reports*, No. P20-48, "Household and Family Characteristics: March 1995" at 5.

[5] A person is a national and citizen of the United States if he or she is "born outside of the United States . . . of parents both of whom are citizens of the United States and one of whom

(Continued on following page)

Second, the drafters were concerned with coordinating American law with that of other countries. The drafters noted that "the laws of some thirty foreign countries contain provisions for the nationality of illegitimate children, . . . and in all but Turkey such children follow the mother's nationality in the absence of any act legally establishing [paternal] filiation." (Proposed Code at 18). Thus, the illegitimate child of a United States citizen mother and a foreign father – unlike the illegitimate child of an American father and a foreign mother – might well not be recognized as a citizen or national by the country where the child was born. Indeed, as late as 1997, the State Department reported that this problem of foreign law remained a concern in nations such as Germany, Great Britain, South Korea, and Vietnam – all jurisdictions in which the United States has or had a significant military presence and which account for a large proportion of citizenship claims by illegitimate children born abroad.[6] Congress, therefore, had good reason to provide a special rule for the transmission of American citizenship to the children of citizen mothers, in order to harmonize American law with relevant foreign laws on this issue and minimize the potential problem that the child might

---

has had a residence in the United States . . . prior to the birth of such person." 8 U.S.C. § 1401(c).

[6] *See* Brief for Respondent United States of America on Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit, *Miller v. Albright*, No. 96-1060 (Oct. 1996 Term), *available at* 1997 WL 433315 at 32-33 (1997).

be stateless. *See* S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (stating that § 1409(c) "insures that the child shall have a nationality at birth").

Although the defendant complains that the Act's residency requirements are "enormously over-broad," (Exhibit 1 at 18), the Supreme Court feels otherwise. In *Miller*, the Court discussed the relatively easy means by which a male can legitimate a child born out of wedlock, as opposed to the burdens borne by the mother throughout pregnancy. The Court found it "obvious that the burdens imposed on the female citizen are more severe than those imposed on the male citizen" by § 1409(a)(4). *Miller*, 523 U.S. at 434. The Court then described as it "singularly unpersuasive" to argue that a "male citizen and his offspring are the victims of irrational discrimination" under the Act. *Id.* The defendant's arguments are equally unpersuasive here.

3. The Residency Requirements Do Not Impermissibly Discriminate Based on Age

The defendant argues that there is no rational basis for applying different residency requirements to young men and women of the same age. "The rational basis test is, more or less, a judicial rubber stamp." *United States v. Sahhar*, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990) (Kozinski, J.). The inquiry is whether "any state of facts reasonably may be conceived" to justify

the legislation. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 74 (1978).

It was not wholly irrational for Congress to apply different rules to young men and women seeking to transmit citizenship. At minimum, in furtherance of the Act's goal of restricting the transmission of citizenship to cases where the single parent has a greater chance of inculcating civic virtues in the child, Congress could have considered the fact that young men are statistically more likely than women to engage in criminal conduct.[7] Wisdom is developed with age. It is laudable that the Act reflects this reality and facilitates the transmission of that "most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), in cases where the citizen father is more likely to have grown and matured. There is no Equal Protection Clause violation.

---

[7] For example, data shows that males under the age of 17 comprised 0.7% of the state inmate population in 1991 while females in the same cohort comprised only 0.1%. Males between the ages of 18-24 comprised 21.6% of the state inmate population in 1991 while similarly situated femals comprised only 16.3% of the population. See Bureau of Justice Statistics Statistics, *Correctional Populations in the United States, 1997*, at 49 tbl. 4.2 (Nov. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9704.pdf (last visited Mar. 23, 2007). Overall, males comprise more than 90 percent of the prison population. *See id.* at 48 tbl. 4.1.

III

CONCLUSION

For the foregoing reasons, the United States respectfully asks that the Court grant the Government's Motion in Limine to Preclude Evidence of Derivative Citizenship.

DATED: March 23, 2007.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ Christopher R. McFadden

CHRISTOPHER R. MCFADDEN
Assistant United States Attorney

[Certificate Of Service Omitted In Printing]

ELIZABETH M. BARROS
California State Bar No. 227629
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467

Attorneys for Mr. Flores-Villar

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA, Plaintiff, v. **RUBEN FLORES-VILLAR,** Defendant.	Case No. 06CR0592-BTM DATE: March 29, 2007 TIME: 2:00 p.m. DEFENDANT'S RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF DERIVATIVE CITIZENSHIP

I.

STATEMENT OF FACTS

Mr. Flores hereby incorporates by reference the Statement of Facts included in the Appeal from the

Decision of the USCIS District Director and documents attached to his N-600 Application. *See* Ex. A.

II.

THE COURT MUST ADMIT EVIDENCE OF DERIVATIVE CITIZENSHIP.

A. The Court Must Permit Mr. Flores to Present Evidence of Derivative/Acquired Citizenship.

Mr. Flores incorporates by reference the arguments set forth in his Appeal from the Decision of the USCIS District Director as to his claim to United States citizenship. Ex. A. However, in addition to those arguments, Mr. Flores submits that because this is a criminal proceedings, he must be able to present evidence which tends to negate alienage, even if incomplete.

In a criminal case, the government has the burden of proving each any every element beyond a reasonable doubt. *See United States v. Smith-Baltiher*, 424 F.3d 913, 921 (9th Cir. 2005). Mr. Flores is charged with violated 8 U.S.C. § 1326. Therefore, the government must prove beyond a reasonable doubt that he is not a United States citizen. *See id.* ("the defendant's alienage is an essential element of the § 1326 offense and that the government must carry its burden with respect to that element just as it does with all others"). As the Ninth Circuit noted in *Smith-Baltiher*, due process and the Sixth Amendment require that the jury have an opportunity to

consider evidence of derivative citizenship. *Id.* (citing *United States v. Marin-Cuevas*, 147 F.3d 889, 892 (9th Cir. 1998). Specifically, the court noted that "Because derivative citizenship would negate that element of the offense, Smith must be allowed to present that defense to the jury. It is only after the jurors consider Smith's evidence of derivative citizenship that they will be able to decide whether the government had successfully met its burden." *Id.* at 922.

B. Mr. Flores Should Be Allowed to Impute His Grandmother's Residence to His Father.

The cases Mr. Flores relies upon to impute his grandmother's residence to his father are not, as the government contends, citizenship retention cases. They are cases that arise in the immigration context, dealing with the interpretation of immigration statutes. Mr. Flores does not ask this Court to transmit citizenship in violation of the statute. Rather, he simply asks the court to interpret an immigration statute consistent with the way the Ninth Circuit has interpreted other immigration statutes in the past. Moreover, as the Ninth Circuit recognized in *Smith-Baltiher*, allowing a defendant to present evidence of U.S. citizenship and having a jury find that evidence credible "would not have the effect of awarding him citizenship." *Smith-Baltiher*, 424 F.3d at 922. "The jury's finding would have determined only that the government had not proven beyond a reasonable doubt that [the defendant] was an alien." *Id.*

III.

CONCLUSION

For the above reason, Mr. Flores must be allowed to present evidence of derivative/acquired citizenship.

DATED: March 26, 2007

Respectfully submitted,

/s/ Elizabeth M. Barros

ELIZABETH M. BARROS
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Flores

EXHIBIT A

Department of Homeland Security
U. S. Citizenship and Immigration Services

OMB No. 1615-0095; Expires 10/31/08
I-290B, Notice of Appeal to the Administrative Appeals Office (AAO)

In the Matter of:	**File Number:**
Ruben FLORES-Villar	A 92414360

1. I am filing an appeal from the decision dated:

12/14/2006

2. Please check the **one** that applies:

   ☐ I am not submitting a separate brief or evidence.

   ☒ I am submitting a separate brief and/or evidence with this form.

   ☐ I am sending a brief and/or evidence to the AAO within 30 days.

   ☐ I need _____ days to submit a brief and/or evidence to the AAO. *(May be granted **only** for good cause shown. Explain in a separate letter, and attach letter to your form.)*

Person Filing Appeal

Signature	E. Barros
Name	Elizabeth M. Barros, FDSDI
Address	225 Broadway, Ste 900 *Number and Street*

San Diego	CA	92101
City	*State*	*Zip Code*

Telephone No. (619) 685-3701

E-Mail address, if any elizabeth_barros@fd.org

Date 01/12/2007

☒ I am an attorney or representative, and I represent

/s/ Ruben FLORES-Villar

Person and/or organization for whom you are appearing.

Telephone No. N/A

E-Mail address, if any N/A

You must attach a Notice of Entry of Appearance (Form G-28) if you are an attorney or representative and did not submit such a form before.

3. Briefly, state the reason(s) for this appeal:

See Attached Brief

UNITED STATES DEPARTMENT OF HOMELAND SECURITY U.S. CITIZENSHIP & IMMIGRATION SERVICES ADMINISTRATIVE APPEALS UNIT

IN THE MATTER OF:	
RUBEN FLORES-VILLAR,	
APPLICANT	**A 92 414 360**
N-600 CERTIFICATE OF CITIZENSHIP	

APPEAL FROM THE DECISION OF THE USCIS DISTRICT DIRECTOR SAN DIEGO, CALIFORNIA

BRIEF ON BEHALF OF THE APPLICANT

ELIZABETH M. BARROS, ESQ.
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, SUITE 900
SAN DIEGO, CA 92101
(619) 234-8467/Fax: (619) 687-2666

ATTORNEYS FOR APPLICANT

STATEMENT OF FACTS

Ruben Flores-Villar ("Mr. Flores-Villar), was born on October 7, 1974 in Tijuana, Mexico. Appendix B at Ex. C-D, L. His biological mother is Maria Mercedes Negrete. *Id.* at Exs. C, K. His biological father is

Ruben Trinidad Flores, a United States citizen since birth. *Id.* at Ex. C. At the time of his birth, Mr. Flores-Villar's father was only sixteen years old. *See* Appendix A, Attachment to I-292. However, his father had resided in the United States for at least ten years. Appendix B at Exs. C, I. Mr. Flores-Villar's paternal grandmother, Eva Carolina Sandez-Machado, is also a United States citizen by birth. *Id.* at Ex. D. At the time of Mr. Flores-Villar's birth, she had resided in the United States for more than twenty-one years, at least five of which were after her fourteenth birthday. *Id.*

When Mr. Flores-Villar was only two months old, his father and his paternal grandmother brought him to the United States in order to receive medical treatment at University Hospital in San Diego. *Id.* at Ex. L. Shortly thereafter, University Hospital sent a letter to the border authorities requesting a permit for Mr. Flores-Villar. *Id.* The letter was written on behalf of Mr. Flores-Villar's father. *Id.* At the time of his release from the hospital, Mr. Flores-Villar's biological mother signed a form authorizing him to be released to his paternal grandmother for adoption planning. *Id.* at Ex. M.

Mr. Flores-Villar grew up in the San Diego area with his father and his paternal grandmother and attended San Diego area schools. *Id.* Exs. C-D, Q-R. In fact, Mr. Flores-Villar had almost no contact with his biological mother. *Id.* at Ex. C. Although Mr. Flores is not listed on Mr. Flores-Villar's birth certificate, he formally recognized him as his son by

filing an acknowledgment of paternity with the civil registry in Tijuana in 1985, when Mr. Flores-Villar was eleven years old. *Id.* at Ex. P. Mr. Flores also claimed Mr. Flores-Villar as his son on his income taxes. *Id.* at Ex. S. In 1988, Mr. Flores-Villar obtained temporary residency through the amnesty program. *Id.* at Ex. T-U. Mr. Flores-Villar subsequently applied to adjust his status from temporary to permanent resident. *Id.* at Ex. V. Since then, Mr. Flores-Villar has fathered several United States citizen children. *Id.* at Exs. C-D.

On September 22, 2006, Mr. Flores-Villar filed an N-600 application. *See* Appendix B. On December 14, 2006, his application was denied. *See* Appendix A. The opinion denying his application states:

> The fact of your legitimation is not in question. What is in question is whether or not your United States citizen father had the required physical presence in the United States prior to your birth in order for you to acquire United States citizenship . . . Since you were born prior to November 14, 1986, your father must have been physically present in the United States for ten years. At least five of those years had to be after his fourteenth birthday. Since your father was only sixteen at the time of your birth, *it is physically impossible for him to have [the] required physical presence necessary* (five years after age fourteen) in order for you to acquire United States citizenship through him.

Id. at Attachment to I-292. Mr. Flores-Villar appeals that decision.

THE DISTRICT DIRECTOR ERRED IN CONSTRUING THE THE IMMIGRATION AND NATIONALITY ACT TO REQUIRE MR. FLORES-VILLAR'S FATHER, WHO WAS A MINOR AT THE TIME OF HIS BIRTH, TO ESTABLISH TEN YEARS OF PHYSICAL PRESENCE IN THE UNITED STATES, FIVE YEARS AFTER THE AGE OF FOURTEEN.

In adjudicating Mr. Flores-Villar's N-600 application, the District Director erroneously required Mr. Flores-Villar to demonstrate that his father had 10 years of physical presence in the United States, five years after the age of fourteen. As the district director's decision notes, under the circumstances of this case, it would be physically impossible for his father to meet that requirement because he was only sixteen years old when Mr. Flores-Villar was born. *See* Appendix A at Attachment to I-292. The District Director further found that although the statute was amended effective November 14, 1986, the shortened residence requirement only applies to those born on or after November 14, 1986. *Id.* However, the public law which provides that the shortened residency requirement applies to those born on or after November 14, 1986 was not passed until 1988, after Mr. Flores-Villar fulfilled all of the requirements under §§ 1401(g), 1409(a). *See* Pub.L 100-525 § 8(r), Oct. 24, 1988, 102 Stat. 2619. As a result, the statute,

as interpreted by the District Director, raises serious constitutional problems: it violates the Fifth Amendment's Due Process Clause by: 1) depriving Mr. Flores-Villar of citizenship which vested in 1986 when Congress shortened the residency requirement, without his concurrence and without a showing of public necessity, *Schneider*, 377 U.S. at 167; and 2) because it discriminates against men under the age of 19 (i.e., along both age and gender lines). In short, this Office should construe the statute so as to avoid these serious constitutional questions – either by applying the 1988 law prospectively only or construing the statute to impute the residency of a citizen grandparent to a citizen father who is under age 19 at the time of his child's birth. Otherwise, the heightened residence requirement applicable to unmarried fathers must be held unconstitutional for violation of equal protection and the shorter residency requirement under § 1409(c) should be applied to both unmarried men and women.

A. The 1988 Amendment Applies Only Prospectively to Individuals Who Had Not Already Met Each of the Requirements Under §§ 1401(g), 1409(a).

Section 1409(a) sets forth certain affirmative steps a United States citizen father must take in order to confer citizenship on a child born out-of-wedlock before the child's age of majority. If the provisions of § 1409 are met, § 1401(g) applies. On February 6, 1985, Mr. Flores-Villar's father formally

legitimated him, thus fulfilling the last of the statutory requirements. Therefore, the only question which remains is whether Mr. Flores-Villar meets the requirements under § 1401(g).

At the time of Mr. Flores-Villar's birth, 8 U.S.C. § 1401(g) stated that the following shall be citizens of the United States:

> A person born outside of the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen.

8 U.S.C. § 1401(g); INA § 301(g). However, on November 14, 1986, this provision was amended and the residence requirement was shortened from ten years to five years, and from five years after the age of fourteen to two years after the age of fourteen. When this amendment took effect, Mr. Flores-Villar's father had already met all of the requirements under § 1409 and the new residence requirements under § 1401(g). Thus, Mr. Flores-Villar's citizenship vested and Congress could not take it away without his concurrence. *See e.g. Schneider v. Rusk*, 377 U.S. 163, 166-69 (1964) (holding that statute which provided for denationalization of naturalized citizens residing abroad violated the Fifth Amendment Due Process

Clause); *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898) ("The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away."); *Perry v. Dulles*, 206 F.2d 586 (3rd Cir. 1953) ("For it has been held that the power of naturalization vested in Congress by the Constitution is a power to confer citizenship not a power to take it away and that a change of citizenship cannot be arbitrarily imposed by Congress without the concurrence of the citizen.").

Nonetheless, on October 24, 1988, Congress passed further legislation which provides that the shortened residency requirements apply to persons "born on or after November 14, 1986." *See* Pub. L. 99-653 § 23(d), as added Pub. L. 100-525, § 8(r). Based on this amendment, the District Director denied Mr. Flores-Villar's N-600 application. *See* Appendix A at Attachment to I-292 ("The shortened residence requirement only applied to those born on or after November 14, 1986 . . . Since your father was only sixteen at the time of your birth, it is physically impossible for him to have required physical presence necessary . . . Therefore, your Application for Certificate of Citizenship is denied for failure to establish that your father had the required physical presence in the United States."). The District Director's interpretation of the statute is erroneous.

As an initial matter, some general principles should be clarified. "Retroactive statutes raise special concerns." *St. Cyr v. INS*, 533 U.S. 289, 315 (2001). Congressional enactments will not be construed to

have retroactive effect unless their language requires this result. *Id.* at 315-316. Congress must *clearly* set forth its intent that a statute apply retroactively. *Id.* at 316. Thus, "the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id.* "The standard for finding such unambiguous direction is a demanding one." *Id.* at 316-17. In fact, the Supreme Court has only upheld such statutes where the language was so clear that it could sustain only one interpretation. *Id.*

When Congress passed the 1988 amendment, it did not clearly set forth its intent that the statute apply retroactively to individuals who fulfilled all of the requirements under the 1986 amendments prior to the enactment of the 1988 law. It simply states, "The amendment made by section 12 <8 USC 1401 note> shall apply to persons born on or after November 14, 1986." Pub. L. 100-525, § 8(r). Significantly, it does not state, as asserted by the District Director, that the amendment shall apply *only* to persons born on or after November 14, 1986. It simply does not address how the statute affects persons born before November 14, 1986. In fact, the statute's language is quite similar to the statutory language in question in *St. Cyr*. As the Supreme Court explained in *St. Cyr*, "the mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application

would produce." *Id.* at 317. A "statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.* Likewise, Congress's statement in 1988 that the shorter residency requirement applies to persons born on or after November 14, 1986 does not even arguably suggest that it does not apply to people born before November 14, 1986, who fulfilled all of the statutory requirements prior to the 1988 enactment. In short, the presumption against retroactive application of ambiguous statutory provision, in conjunction with the longstanding principle of construing any lingering doubt in immigration and criminal statutes in favor of the alien or defendant foreclose the conclusion that Congress affirmatively considered the potential unfairness of retroactively applying the 1988 law to individuals like Mr. Flores-Villar. *See e.g., St. Cyr*, 533 U.S. at 320.

The 1988 law operates retroactively to deprive people like Mr. Flores-Villar of their right to citizenship. "A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321. The 1988 law, as interpreted by the District Director, operates retroactively. For example, in this case, it took away Mr. Flores-Villar's vested right to citizenship, which he acquired in 1986 when the residency requirement was shortened from ten years

to five years and from four years after the age of fourteen to two years after the age of fourteen. It attached new disabilities: the ability to be deported and forced to live in a foreign land, as well as the inability to vote, and has subjected him to prosecution under 8 U.S.C. § 1326 for returning to the country in which he was raised, in which his father was raised and in which his grandmother was raised. It imposed a new duty upon him – to go through the naturalization process if he wished to obtain citizenship. These duties and disabilities did not exist under the 1986 statute as originally enacted. Therefore, this Office should construe the 1988 statute to apply prospectively to individuals who had not yet met each of the requirements under § 1401(g) and § 1409(a) at the time the 1988 statute was enacted.

Moreover, retroactive application of the 1988 law to individuals like Mr. Flores-Villar, who fulfilled all of the requirements prior to that date, would violate the Fifth Amendment by divesting them of citizenship without their concurrence and without a showing of public necessity in violation of the Fifth Amendment. In *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994), the Supreme Court explained that "a justification sufficient to validate a statute's prospective application under the [Due Process] Clause may not suffice to warrant its retroactive application." (citations and quotations omitted). *See also id.* at 185-286 (fact that retroactive application of statute may vindicate its purpose more fully is insufficient to rebut presumption against retroactivity). Due Process

requires that Congress articulate a sufficient reason not only for the legislation itself, but for the retroactive application of the legislation. *See United States v. Yacoubian*, 24 F.3d 1, 7-8 (9th Cir. 1994).

In this case, because the District Director's interpretation of the statute retroactively divests individuals of the "precious right to citizenship," in order to withstand constitutional scrutiny, the statute must be justified by some urgent public necessity. *See Schneider*, 377 U.S. at 167 ("such legislation, touching as it does on the 'most precious right' of citizenship, would have to be justified under the foreign relations power 'by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived.") (internal citations omitted). Here, Congress neither articulated, nor could it articulate, a rational basis to retroactively apply the 1988 law to people like Mr. Flores-Villar, much less an urgent public necessity, as required under *Schneider*. Therefore, this Office should, under the canon of constitutional avoidance, construe the statute to avoid such a problem – in other words, it should construe the 1988 law to apply only prospectively to such individuals who had not already fulfilled each of the requirements under 8 U.S.C. §§ 1401(g), 1409(a). *See St. Cyr*, 533 U.S. at 299-300 (where a "construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [a court is] obligated to construe the statute to avoid such problems."); *see*

also United States v. Buckland, 289 F.3d 558, 564 (9th Cir. 2002) (en banc). In addition to avoiding constitutional retroactivity concerns, this construction of the statute would alleviate the need (in this case) to decide the equal protections problems set forth below, as well as the statute's unconstitutional restriction on fundamental rights such as the right to engage in consensual sexual activity, the right to have children, and the right to direct the education and upbringing of ones children. *See e.g Lawrence v. Texas*, 539 U.S. 558, 573-574 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decision relating to marriage, procreation, contraception, family relationships, child rearing, and education.") (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). *See also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). Finally, the rule of lenity, *see e.g. Jones v. United States*, 529 U.S. 848, 858 (2000) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"), counsels against application of the 1988 law to Mr. Flores-Villar.

B. Mr. Flores-Villar's Paternal Grandmother's Residency Should Be Imputed to His Father, Who Was a Minor at the time of Mr.

Flores-Villar's Birth, in Order to Avoid a Serious Constitutional Problem.

Alternatively, § 1401(g) should be construed to impute the residence of a citizen grandparent to a citizen father who has a child out-of-wedlock while still a minor. This construction of the statute is consistent with the way in which courts have construed other portions of the Immigration and Nationality Act. In *Cuevas-Gasper v. Gonzalez*, 430 F.3d 1013 (9th Cir. 2005), the petitioner, Mr. Cuevas-Gasper, argued that his presence in the United States as an unemancipated minor residing with his lawfully-admitted mother should count towards the requirement, under INA § 240A(a)(2) that he have resided in the United States continuously for seven years "after having been admitted in any status." *Id.* at 1016. Mr. Cuevas-Gasper entered the United States in 1985, when he was one year old, but did not obtain legal status until 1997. His mother, however, was attained permanent resident status in 1990, when Mr. Cuevas-Gasper was seven-years old. *Id.* On February 23, 2003, the INS issued Mr. Cuevas-Gasper with a notice to appear. *Id.* At his removal hearing, the immigration judge (IJ) concluded that Mr. Cuevas Gasper could not establish the required seven years of continuous residence "after having been admitted in any status" to qualify for cancellation of removal because he was not admitted to the United States until 1997. Mr. Cuevas-Gasper appealed, first to the Board of Immigration Appeals (BIA), and then to the Ninth Circuit. Mr. Cuevas-

Gasper argued, among other things, that he satisfied the seven-year continuous residence requirement for cancellation of removal because his presence in the United States as a minor residing with his lawfully-admitted mother should count. *Id.* The Ninth Circuit construed the cancellation of removal statute to allow the lawful presence of a minor's parents to be imputed to the minor, dependant child.

Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Ninth Circuit reasoned that although the statue was silent as to whether a parent's status may be imputed to the parent's unemancipated minor child, the BIA's interpretation of the statute would frustrate congressional intent. *Id.* at 1021-1022, 1029. The court started with an analysis of its prior holding in *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994), where it held that the lawful residence of a parent can be imputed to the child to satisfy the seven-year "lawful unrelinquished domicile" requirement for the now-repealed relief known as a § 212(c) waiver. *Id.* at 1022-23. *See also id.* at 1024 ("We explained, that on remand, if Lepe-Guitron can show that his parents have accrued seven years of lawful unrelinquished domicile after having been lawfully admitted for permanent residence, then Lepe Guitron should be considered likewise to have accrued seven years of continuous residence after having been lawfully admitted for permanent residence and therefore eligible for § 212(c) relief."). The Ninth Circuit noted that both the BIA and the Ninth Circuit "repeatedly

have held that a parent's status, intent, or state of mind is imputed to the parent's unemancipated minor child in many areas of immigration law, including asylum, ground of inadmissibility, and legal residency status." *Id.* at 1024.

Here, the District Director has interpreted the statute to render it physically impossible for Mr. Flores-Villar's father to meet the residency requirements because he was under nineteen years of age. The District Director's interpretation of the statute discriminates against fathers who have children abroad while under the age of nineteen, thereby violating the equal protection guarantees implicit in the Due Process Clause of the Fifth Amendment. Mr. Flores-Villar asks the court to avoid the serious constitutional question raised by the agency's interpretation of the statute by interpreting the statute to allow Mr. Flores-Villar's grandmother's residence in the United States to be imputed to his father, who was a minor when he was born. Such a reading of the statute is not only plausible, it is consistent with the Ninth Circuit's prior precedent in *Cuevas-Gasper* and *Lepe-Guitron*.

Mr. Flores-Villar's grandmother easily meets the residency requirement. *See* Appendix B at Exs. D, G. She lived in the United States for the first six to seven years of her life. *Id.* She returned to the United States for a few years as a teenager. *Id.* She again returned in 1959 and lived here until 1961. Finally, in 1963, she returned to the United States where she has lived ever since. *Id.* Thus, at the time of Mr.

Flores-Villar's birth, his paternal grandmother had resided in the United States at least twenty-one years, at least twelve of which were after the age of fourteen. That residence must be imputed to her child, Mr. Flores-Villar's father.

C. THE RESIDENCY REQUIREMENTS UNDER THE IMMIGRATION AND NATIONALITY ACT DISCRIMINATE ON THE BASIS OF GENDER IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. XIV Amend. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider*, 377 U.S. at 169 (citations omitted); *Nguyen v. INS*, 533 U.S. 53, 57 (2001) (noting that equal protection guarantees are embedded within the Due Process Clause of the Fifth Amendment).

A. The Residency Requirements Provided for by the Immigration and Nationality Act Discriminate on the Basis of Gender in Violation of the Equal Protection Clause.

1. Intermediate Scrutiny Should Apply Because the Law Treats Unmarried Men More Harshly than Unmarried Women.

There is a strong presumption that gender-based legal distinctions are suspect. *Miller v. Albright*, 523 U.S. 420, 445 (1998). Thus, classifications based on gender are generally subjected to intermediate scrutiny. This means gender-based classifications must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *Accord Nguyen*, 533 U.S. at 62 ("For gender-based classifications to survive equal protection scrutiny, it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to achievement of those objectives.") (internal citations and quotations omitted).

The Immigration and Nationality Act treats the children of unmarried United States citizen fathers and unmarried United States citizen mothers differently by imposing different parental residency requirements depending on the gender of the parent. For example, a child born in 1974 to an unmarried United States citizen mother acquires U.S.

citizenship at birth if the mother resided in the United States continuously for one year prior to the child's birth. *See* 8 U.S.C. § 1409(c); INA § 309(c). In contrast, a child born to an unmarried United States father does not acquire United States citizenship unless the child can prove that his or her father meets the strict residency requirements set forth in 8 U.S.C. § 1401(g). Thus, the children of unmarried men receive vastly different treatment than the children of unmarried women. Because the law discriminates on the basis of gender, intermediate scrutiny applies.

2. Requiring Different Residency Requirements for Unmarried Men and Unmarried Women Is Not Substantially Related to an Important Governmental Interest.

In *Miller v. Albright*, 523 U.S. 420 (1998) and *Nguyen*, 533 U.S. 53, the Supreme Court upheld some of the provisions in the INA which discriminate on the basis of gender. Significantly, the Supreme Court did not rule upon the constitutionality of the different residency requirements that apply to unmarried men and women. Those requirements, unlike the other provisions addressed in those cases, have no rational basis, let alone a substantial relation to an important governmental interest. Therefore, they cannot be relied upon to prosecute Mr. Flores-Villar.

In *Miller*, 523 U.S. at 424, the illegitimate daughter of a United States citizen father challenged on equal protection grounds the statute governing acquisition of citizenship at birth by children born out of wedlock and outside the United States. In particular, she challenged the requirement that a citizen father, unlike a citizen mother, take certain affirmative steps to confirm the parent-child relationship while the child is still a minor. *Id.* A plurality of the Supreme Court rejected the challenge to § 1409(a)(4), however, there was no majority opinion. Justice Stevens, joined by Justice Rehnquist, reasoned that 8 U.S.C. § 1409(a)(4)'s additional proof-of-paternity requirement imposed on citizen fathers and thus did not represent an unconstitutional denial of equal protection based on the sex of the citizen parent. The two justices found three important government interests served by the requirement: 1) ensuring that a child born out of wedlock actually shares a blood relationship with the parent (i.e., in light of the fact that male and female parents are not similarly situated in this respect since the blood relationship of mother is immediately obvious where the blood relationship of the father is not), *id.* at 435; encouraging a healthy relationship between the child and the citizen parent while the child is a minor, *id.* at 438, and; third, the related interest in fostering ties between the child and the United States. *Id.*

Justice Steven's opinion reaffirmed that "'[d]iscrimination that is merely the accidental byproduct of a traditional way of thinking about

females' is unacceptable." *Id.* at 442. Moreover, he stated that "if the classification in § 1409 were merely the byproduct of an outmoded stereotype, it would be invalid." *Id.* at 443. However, Justice Stevens found that none of the governmental interests underlying § 1409(a)(4) could be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex. *Id.* at 444-45. Rather, the biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born out of wedlock in foreign lands, and an impartial analysis of those differences rebuts the strong presumption that gender-based legal distinctions are suspect. *Id.* at 445.

In *Nguyen*, a majority of the Court decided the issue which was raised, but not decided in *Miller*: whether the statutory distinctions in § 1409 are consisted with the equal protection guarantees embedded in the Due Process Clause of the Fifth Amendment. *Id.* at 56-57. In *Nguyen*, as in *Miller*, the child of a United States citizen father challenged § 1409(a)(4)'s requirement that a United States citizen father legitimate the child or acknowledge paternity in writing or in a court of competent jurisdiction prior to the child's eighteenth birthday. Although additional issues were raised, the Court only upheld the constitutionality of § 1409(a)(4). *Nguyen*, 533 U.S. at 61 ("[O]ur ruling respecting § 1409(a)(4) is dispositive of the case."); *id.* at 62 ("The statutory distinction relevant in this case, then,

is that § 1409(a)(4) requires one of three affirmative steps to be taken if the citizen parent is the father, but not if the citizen parent is the mother: legitimation; a declaration of paternity under oath by the father; or a court order of paternity.").

In finding § 1409(a)(4) constitutional, the Supreme Court adopted much of Justice Steven's reasoning in *Miller*. In particular, the Court recognized two important governmental interests: 1) ensuring a biological relationship between the parent and child, *see id.* at 62; and 2) ensuring that the child and citizen parent have some demonstrated opportunity or potential to develop a relationship that consists of the real, everyday ties that provide a connection between the child and the citizen parent. *See id.* at 64-65.

The Supreme Court explained that "Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant *difference between their respective relationships to the potential citizen at the time of birth.*" *Id.* at 62 (emphasis added). A mother's biological relationship to a child is evident at birth where as a father's is not. A father, may not even know he has child, particularly where the child is born overseas and out-of-wedlock. "Indeed, especially in light of the number of short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility." *Id.* at 66 "Thus, unlike the case of the mother, there is no assurance that the father and his biological child will ever meet.

Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship." *Id.* The Court emphasized:

> [T]he difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis. There is nothing irrational or improper in the recognition that at the moment of birth – a critical event in the statutory scheme and in the whole tradition of citizenship law – the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.

Id. at 68.

The different physical presence requirements for unmarried U.S. citizen women and unmarried U.S. citizen men is not supported by the same rationale set forth in *Miller* and *Nguyen*. Unlike the distinctions upheld in *Miller* and *Miller*, this distinction is utterly unrelated to "the significant difference between the[ ] respective relationships [of mothers and fathers] to the potential citizen at the time of birth." *Nguyen*, 533 U.S. at 62. It is not based on any innate biological differences between men and women. Likewise, there is no connection between a parent's residence in the United States prior to the child's birth and either the biological relationship between the parent and child or the likelihood that

the parent will foster the "real, everyday ties that provide a connection between child and citizen parent . . . " *Id.* at 65.[1] There simply is no relationship between the important governmental interests previously recognized by the Court and the different physical presence requirement imposed on unmarried men and women prior to the child even being born. It is this requirement, which was not decided in either *Miller* or *Nguyen*, that Mr. Flores-Villar challenges. *See Miller*, 523 U.S. at 1430 ("Since petitioner's father satisfied the residency requirement in § 1401(g), the validity of the distinction between that requirement and the unusually generous provision in § 1409(c) is not at issue."). Mr. Flores-Villar's N-600 application was denied, not because of any issue with respect to his legitimacy, but solely because of his father's failure to meet the residency requirement in § 1401(g). *See* Appendix A at Attachment to I-292.

The stereotypical basis for the different physical presence requirements for men and women is elucidated by the facts of this case. Mr. Flores-Villar's biological parents are Ruben Trinidad Flores and Maria Mercedes Negrete; however, Mr. Flores-Villar has never had a parent-child relationship with his biological mother. In contrast, his father was active in his life from the time he was hospitalized as an

---

[1] The facts of this case demonstrate that the opposite is true: Mr. Flores-Villar's father plainly established a relationship with him, but was precluded from establishing the requisite residence.

infant. Appendix B at Ex. L. His father and his father's family raised him, his father was listed on his baptismal certificate, his father formally legitimated him while he was still a minor, his father claimed him on his tax returns and was listed as his parent on his school records. *Id.* at Exs. C-D, N, P, Q, S.

Mr. Flores-Villar's father not only established a relationship with him, he ensured that Mr. Flores-Villar developed ties to the United States. He brought Mr. Flores-Villar to the United States to when he was only a few months old. *Id.* at Exs. C-D. He requested a permit for Mr. Flores-Villar to remain in the United States when Mr. Flores-Villar was still an infant. *Id.* at Ex. L. He took him to the Church of Our Lady of Guadalupe in San Diego, CA, to be baptized when he was less than three months old. *Id.* at Ex. N. Mr. Flores-Villar continued to live with his father and his father's family in the San Diego area throughout his childhood. *Id.* at Ex. C-D. He attended Chollas School, Harborside Elementary School, and Castle Park Middle School. *Id.* at Q-R. Mr. Flores-Villar is now the father of several United States citizen children. *Id.* at C-D.

Although Ms. Negrete is Mr. Flores-Villar's biological mother, she did not raise him, and does not have a parent-child relationship with him. *See id.* He never lived with her. *Id.* In fact, Mr. Flores-Villar has only spoken with her a handful of times in his life. *Id.* Yet, Mr. Flores-Villar's N-600 application was denied despite the fact that he was raised in the United States by his United States citizen relatives and all

his ties remain here in the United States because, based on the gender of his United States citizen parent, he was unable to demonstrate the requisite physical presence. *See* Appendix A at Attachment to I-292.

The different physical presence requirements imposed on unmarried men and women do not promote any important governmental interest: they are are not based on the significant difference between the respective relationships of men and women to the potential citizen at the time of birth, they do not ensure a biological relationship between the parent and child, or in any way promote the governmental interest in ensuring that the child and citizen parent have some demonstrated opportunity or potential to develop a relationship that consists of the real, everyday ties that provide a connection between the child and the citizen parent. *See Nguyen*, 533 U.S. at 62-65.

Even if some governmental interest could be identified, the different requirements at issue here are enormously over-broad. *See Mississippi University for Women*, 458 U.S. at 724 ("[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification."). (citations omitted); *see also Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (noting the familiar principle that even a constitutionally valid governmental purpose "may not be achieved by means which sweep unnecessarily

broadly and thereby invade the area of protected freedoms."). Because the statute discriminates along gender lines and implicates the most precious right to citizenship, there must be an exceedingly persuasive justification for the classification. The burden is met only by showing that the discriminatory means employed are "substantially related to the achievement of those objectives." *Mississippi University for Women*, 458 U.S. at 724.

In *Schneider*, for example, the Court considered the constitutionality of a statute that provided for the denationalization of naturalized citizens who resided continuously in the territory of a foreign state of which they were formerly a national. 377 U.S. at 164. The government argued that the statute should be upheld under the foreign relations power. The Court found that the statute, which treated naturalized citizens differently from native born citizens was unconstitutional because the means, withdrawal of citizenship, was not reasonably calculated to meet the end. *Id.* at 166-167. The Court reasoned that the statute proceeded "on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born." *Id.* at 168. The Court explained that, "[t]he discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may." *Id.* at 168-169. The Court emphasized that "[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a

voluntary renunciation of nationality and allegiance." *Id.* Because the statute swept unnecessarily broadly, thereby burdening the right of some citizens to live and work abroad, it was found unconstitutional. Similarly, having less than five years of residence in the United States after the age of fourteen, whether the citizen be a man or a woman, is no badge of lack of allegiance and in no way evidences a citizen parent's unwillingness to establish a relationship with his or her child or promote ties to the United States. Therefore, the discriminatory residency requirements at issue here, like the discriminatory residency requirements at issue in *Schneider*, must be struck down because they over-broad.

As the District Director noted when denying Mr. Flores-Villar's N-600 application, because Mr. Flores-Villar's father was only sixteen when he was born "it is physically impossible for him to have [the] required physical presence necessary (five years after the age fourteen) in order for [him] to acquire United States through him." Appendix A at Attachment to I-292. In contrast, an unmarried woman must show only one year of residence in the United States prior to the child's birth. Thus, unlike men who father children while under the age of nineteen, it is physically possible for girls who give birth abroad before their nineteenth birthday to establish the requisite physical presence. In short, the discriminatory provisions at issue here are not substantially related to an important governmental interest, and thus, violate the equal protection

guarantee embedded in the Due Process Clause of the Fifth Amendment. As in *Schneider*, the discriminatory provisions at issue here burden the right of some citizens to live and work abroad. They also place an undue burden on the fundamental right of men to have children and direct the education and upbringing of their children. *See Lawrence*, 539 U.S. at 573-574; *see also Baird*, 405 U.S. 438, 453 (1972). As the Supreme Court recently explained, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects . . . " *Lawrence*, 539 U.S. at 575. A decision finding the law to violate the equal protection guarantees embedded in the Fifth Amendment will, in this case, advance both interests.

3. The Differential Treatment of Unmarried Women and Unmarried Men at Issue Here Fails Even Rational Basis Scrutiny.

At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). The Supreme Court has been most likely to apply rational basis review to find that a law violates the Constitution's equal protection guarantees where, as here, "the challenged legislation inhibits personal relationships." *See Lawrence*, 539 U.S. at 580 (Justice O'Conner, concurring).

The requirement that unmarried fathers must establish numerous years of physical presence in the United States before their children's birth in order for their children to acquire citizenship, while similarly situated unmarried mothers are only required to demonstrate physical presence in the United States for one year at some point before their children's birth, is not rationally related to any legitimate governmental purpose. There is simply no rational reason to entrust an eighteen year old male to vote, allow him to serve in the military, yet render it physically impossible for him to confer citizenship on a child born abroad and out-of-wedlock, especially when a woman, who has greater ability to chose where a child is born, can confer citizenship on her children. In short, the constitutionality of the statute cannot be sustained.

D. THE RESIDENCY REQUIREMENTS PROVIDED FOR BY THE IMMIGRATION AND NATIONALITY ACT DISCRIMINATE ON THE BASIS OF AGE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439. However, the statutory scheme at play here does not treat all persons similarly situated alike. As noted above, it renders it physically impossible for United States citizen fathers who are underage nineteen at the time of their child's birth to confer citizenship on

a child born abroad, while permitting a United States citizen mother to confer citizenship so long as she resided in the United States for one year prior to her child's birth. This provision not only discriminates on the basis of gender, it also discriminates on the basis of age: it is legally and physically impossible for United States citizen fathers under age nineteen to confer citizenship upon their foreign-born children, even if they have ten years of residence in the United States. In short, it treats men underage nineteen different from similarly situated men over nineteen years old. The fact that the statute allows minor women to transmit citizenship to their foreign born (out-of-wedlock) children, but not minor men, demonstrates there is no rational basis for such discrimination.

CONCLUSION

The District Director erroneously construed the residency requirement applicable to this case. First, the shorter residency requirement under the 1986 Act must apply to people, like Mr. Flores-Villar, who met all of the requirements under § 1401(g) and § 1409(a) prior to the passage of the 1988 law. Second, the statute should be construed to allow a grandparent's residency to be imputed to a minor parent who fathers a child out-of-wedlock and abroad. Finally, the requirement that a father establish ten years of physical presence, five of which are after the age of fourteen, violates the equal protection guarantees embedded in the Fifth Amendment by discriminating

along both age and gender lines, in addition to and interfering with a man's personal decisions regarding family relationships and child rearing.

DATED: January 13, 2007

Respectfully Submitted,

ELIZABETH M. BARROS
Federal Defenders of San Diego, Inc.
Attorneys for Ruben Flores-Villar
A 92 414 360

APPENDIX A

U.S. Department of Justice
Immigration and Naturalization Service **DECISION**

Refer To This File Number: A 92 414 360

Date: DEC 14 2006

FLORES-Villar, Ruben
C/O Elizabeth M. Barros, Esq.
Federal Defenders of SD, Inc.
225 Broadway #900
San Diego, CA 92101

It is ordered that your **N-600**

☒ **be denied because:**
☐ **be revoked because:**

Please see attachment.

You may, if you wish, appeal this decision. You must submit an appeal to **THIS OFFICE** with a **filing fee of $385.00**. If you do not file an appeal within the time allowed, this decision is final. Appeal in your case may be made to:

☐ The Board of Immigration Appeals (Board) in Falls Church, Virginia. It must reach this office *within 15 calendar days* from the date this notice is served (18 days if this notice is mailed).

☒ The Administrative Appeals Unit (AAU) in Washington, D.C. It must reach this office *within 30 calendar Days* from the date this notice is served (33 days if this notice is mailed).

Do ***NOT*** send your appeal directly to the Board or to the AAU. Please direct any questions you may have to the Immigration and Naturalization Service office nearest your residence.

Enclosure(s)

Form I-292
(Rev. 10-26-90)N

Sincerely yours,

/s/ Paul M. Pierre
District Director

DEC 14 2006

Attachment to I-292

On September 22, 2006, you filed an Application for Certificate of Citizenship, Form N-600, basing your eligibility on the claim that you acquired your United States Citizenship through your United States citizen father.

You were born on October 7, 1974, in Tijuana, B.C. Mexico, out of wedlock, to Maria Merced Negrete-Vasquez, a citizen of Mexico and Ruben Trinidad Flores, a citizen of the United States who acquired his United States citizenship through his mother. Your parents never married, however, your father acknowledge and legitimated you on February 6, 1985 when you were eleven years old. Your father was born on December 25, 1957, making him only sixteen years old at the time of your birth on October 7, 1974.

The fact of your legitimation is not in question. What is in question is whether or not your United States citizen father had the required physical presence in the United States prior to your birth in order for you to acquire United States citizenship.

The law in effect at the time of your birth under Section 301(a)(7) of the Immigration and Nationality Act, as amended, states that the following shall be citizens of the United States at birth:

> A person born outside of the geographical limits of the United States and its outlying

> possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen.

(See notation 612 under Section 301(g), which shortened the residence requirement for the parent from ten years/five after age fourteen to five years/two after age fourteen. The shortened residence requirement only applied to those born on or after November 14, 1986.)

Since you were born prior to November 14, 1986, your father must have been physically present in the United States for ten years. At least five of those years had to be after his fourteenth birthday. Since your father was only sixteen at the time of your birth, it is physically impossible for him to have required physical presence necessary (five years after age fourteen) in order for you to acquire United States citizenship through him.

Therefore, your Application for Certificate of Citizenship is denied for failure to establish that your father had the required physical presence in the United States.

APPENDIX B

FEDERAL DEFENDERS OF SAN DIEGO, INC.

The Federal Community Defender Organization
for the Southern District of California

[Address And Phone Numbers Omitted In Printing]

September 22, 2006

URGENT

Victoria Porto
District Ombudsman
U.S. Citizenship and Immigration Services
880 Front Street, Room 4251
San Diego, CA 92101

RE: Ruben Flores-Villar, A92414360
N-600 Application and Request for Fee Waiver

Dear Ms. Porto:

Attached is an N-600 application, 3 color photographs, supporting documentation and a request for a fee waiver which I am submitting on behalf of Ruben Flores-Villar ("Mr. Flores-Villar). Mr. Flores-Villar has been charged with a violation of 8 U.S.C. § 1326 and is currently in the middle of a criminal prosecution in federal court. Assistant United States Attorney Jason Goldberg is handling the case for the prosecution. He has advised me that you review and make decisions for all fee waiver requests under these circumstances.

Mr. Flores-Villar Should Be Granted a Fee Waiver:

Pursuant to 8 C.F.R. § 103.7(c), I respectfully request that you waive the filing fee in Mr. Flores-Villar's case. Attached is an affidavit signed by Mr. Flores-Villar, verification that he is currently in custody in conjunction with a pending federal case and has been appointed counsel by the district court. Based on this information, I believe that Mr. Flores-Villar is deserving of a fee waiver and am thus requesting that he be granted permission to file the attached N-600 application without payment of the application fee.

Mr. Flores-Villar is a United States Citizen under 8 U.S.C. §§ 1401(g) and 1409:

I believe that Mr. Flores-Villar is a United States citizen pursuant to 8 U.S.C. §§ 1401(g), 1409 by virtue of his birth abroad to a United States citizen father. Because Mr. Flores-Villar was born in 1974, former section 1409 applies to him. *See* 8 U.S.C. § 1409, Historical and Statutory Notes. Pursuant to former section 1409, section 1401(g) applies "as of the date of birth to a child born out of wedlock if on or after the effective date of this Act, if the paternity of such child is establish while such child is under the age of twenty-one years by legitimation." 8 U.S.C. § 1409 (pre-1986).

As the attached documents demonstrate, Mr. Flores-Villar has lived in the United States since he

was only 2 months old. Mr. Flores-Villar grew up in the United States in the legal custody of father, Ruben Trinidad Flores ("Mr. Flores"), who has been a United States citizen since birth and who legally recognized him as his son. In fact, Mr. Flores-Villar has had very little contact with his biological mother, having spoken to her only a few times on the telephone.

Mr. Flores was admitted to the United States as a legal permanent resident on May 18, 1959, and resided in the United States until 1961. Mr. Flores resumed residence in the United States in 1963 and has lived here ever since. Around 1965 or 1966, Mr. Flores' mother purchased a home in San Diego, California, where he lived for many years. In short, Mr. Flores was present in the United States for approximately 13 years prior to Mr. Flores-Villar's birth. In fact, at the time of his son's birth, Mr. Flores was residing in the United States, and continued to do so after his son was born. Mr. Flores currently resides in Parachute, Colorado and is available for an interview if you so wish.

Mr. Flores-Villar is a Citizen Under Former 8 U.S.C. §§ 1432 and 1433:

In addition to the provisions of 8 U.S.C. §§ 1401(g) and 1409, Mr. Flores-Villar is also eligible for citizenship under former 8 U.S.C. §§ 1432 and 1433.

Former 8 U.S.C. §1432 provides that a child born outside of the United States to alien parents becomes

a citizen upon fulfillment of the following conditions: naturalization of the parent having legal custody of the child when there has been a legal separation of the parents; and if such naturalization takes place while such child is under the age of eighteen years; and such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization or thereafter begins to reside in the United States permanently while under the age of eighteen years. 8 U.S.C. §1432; INA § 321(a). Each of these conditions has been fulfilled in this case. Although Mr. Flores was naturalized in 1999, that naturalization was retroactive to the time of his birth, and thus necessarily took place while Mr. Flores-Villar was under the age of eighteen. *See Nguyen v. INS*, 533 U.S. 53, 72 (2001) ("Citizenship under § 1409(a) is retroactive to the date of birth, but it is a naturalization under § 1421(d) nevertheless."). Mr. Flores-Villar thereafter began to reside permanently in the United States. Moreover, there was a legal separation between his parents and he grew up in the legal custody of his father.

Finally, 8 U.S.C. § 1433 provides that a parent who is a citizen of the United States may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 1431 provided that: (1) At least one parent is a citizen of the United States, (2) The United States citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less

than five years, at least two of which were after attaining the age of fourteen years, or has a citizen parent who has been physically presenting the United States or its outlying possession for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; (3) the child is under the age of eighteen years; and (4) the child is residing outside the United States in legal and physical custody of the citizen parent, is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

Mr. Flores-Villar is the child of a United States citizen, both his father and his paternal grandmother meet the applicable physical presence requirements, and prior to turning eighteen, he was physically present in the United States pursuant to a lawful admission and was in the lawful and physical custody of his citizen father. Although Mr. Flores-Villar is now over eighteen years of age, his failure to apply for citizenship pursuant to this section does not preclude a finding of citizenship because he did not know of his claim to citizenship before he turned eighteen due to the fact that his father was not found to be citizen until 1999. *See, e.g. Matter of Yanez-Carrillo*, 10 I & N. Dec. 366 (BIA 1963) (holding that a person does not lose citizenship to failure to enter and reside in the United States before age of 28 when person did not know of claim to citizenship before that time). Accord *Matter of Farley*, 11 I. & N. Dec. 51 (BIA 1965); *Matter of L-B-D*, 4 I. & N. Dec. 639 (1952).

Thank you in advance for your prompt attention to this matter. If you require any further information or documentation, please do not hesitate to contact me. My direct line is (619) 685-3701.

Sincerely,

Elizabeth M. Barros
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Flores-Villar

OMB No. 1615-0057; Expires 10/31/05
You may continue to use this form after expiration date.

Department of Homeland Security
U.S. Citizenship and Immigration Services

N-600, Application for Certificate of Citizenship

Print clearly or type your answers, using CAPITAL letters in black ink. Failure to print clearly may delay processing of your application.

Part I. Information About You. *(Provide information about yourself, if you are a person applying for the Certificate of Citizenship. If you are a U.S. citizen parent applying for a Certificate of Citizenship for your minor child, provide information about your child).*

If your child has an "A" Number, write it here:

A 92414360

A. Current legal name

Family Name *(Last Name)*: FLORES-VILLAR

Given Name *(First Name)*: RUBEN

Full Middle Name *(If applicable)*:

B. Name exactly as it appears on your Permanent Resident Card *(If applicable)*

Family Name *(Last Name)*: N/A

Given Name *(First Name)*: N/A

Full Middle Name *(If applicable)*: N/A

C. Other names used since birth

Family Name *(Last Name)*	Given Name *(First Name)*	Middle Name *(If applicable)*
NEGRETE	RUBEN	FLORES-VILLAR
VASQUEZ	RUBEN	NEGRETE

D. U.S. Social Security # *(If applicable)*: xxx-xx-xxxx

E. Date of Birth *(mm/dd/yyyy)*: 10/07/1974

F. Country of Birth

G. Country of Prior Nationality

Returned	Receipt
Date	
Date	
Resubmitted	
Date	
Date	
Reloc Sent	
Date	
Date	
Reloc Rec'd	
Date	
Date	

Remarks

Action Block

MEXICO	MEXICO	
H. Gender	**I. Height**	
☒ Male ☐ Female	5'10"	

Part 2. Information About Your Eligibility. *(Check only one).*

A. I am claiming U.S. citizenship through:

- ☒ A U.S. citizen father or a U.S. citizen mother.
- ☐ Both U.S. citizen parents.
- ☐ A U.S. citizen adoptive parent(s).
- ☐ An alien parent(s) who naturalized.

B. ☐ **I am a U.S. citizen parent applying for a certificate of citizenship on behalf of my minor (under 18 years) BIOLOGICAL child.**

C. ☐ **I am a U.S. citizen parent applying for a certificate of citizenship on behalf of my minor (less than 18 years) ADOPTED child.**

D. ☐ **Other** *(Please explain fully)* _____

To Be Completed by

☐ ***Attorney or Representative,*** *if any.*

Fill in box if G-28 is attached to Represent the applicant.

ATTY State License #

Part 3. Additional Information About You. *(Provide additional information about yourself, if you are the person applying for the Certificate of Citizenship. If you are a U.S. citizen parent applying for a Certificate of Citizenship for your minor child, provide the additional information about your minor child).*

A. Home Address – Street Number and Name *(Do not write a P.O. Box in this space)*

METROPOLITAN CORRECTIONAL CENTER ("MCC"), 808 UNION STREET				
City	**County**	**State/Province**	**Country**	**Zip/Postal Code**
SAN DIEGO	SAN DIEGO	CA	USA	92101

Apartment Number

B. Mailing Address – Street Number and Name *(If different from home address)*

C/O Elizabeth M. Barros, Esq., Federal Defenders of SD, Inc., 225 Broadway

Apartment Number: 900

City	County	State/Province	Country	Zip/Postal Code
SAN DIEGO	SAN DIEGO	SAN DIEGO	USA	92101

C. Daytime Phone Number *(if any)*: ( )

Evening Phone Number *(if any)*: ( )

E-Mail Address *(If any)*:

D. Marital Status

☒ Single, Never Married ☐ Married ☐ Divorced ☐ Widowed

☐ Marriage Annulled or Other *(Explain)*

E. Information about entry into the United States and current immigration status

1. I arrived in the following manner:

Port of Entry *(City/State)*	Date of Entry *(mm/dd/yyyy)*	Exact Name Used at Time of Entry
N/A	10/07/2005	N/A

2. I used the following travel document to enter:

☐ Passport

☐ **Passport Number** | **Country Issuing Passport** | **Date Passport Issued** *(mm/dd/yyyy)*

Other *(Please Specify Name of Document and Dates of Issuance)*

None

3. **I entered as:**

☐ An immigrant (lawful permanent resident) using an immigrant visa.

☐ A nonimmigrant

☐ A refugee

☐ Other *(Explain)* EWI

4. I obtained lawful permanent resident status through adjustment of status *(If applicable)*:

Date you became a Permanent Resident *(mm/dd/yyyy)*	USCIS (or former INS) Office where granted adjustment of status

F. Have you previously applied for a certificate of citizenship or U.S. passport? ☒ No ☐ Yes *(Attach Explanation)*

G. Were you adopted? ☒ No ☐ Yes *(Please complete the following information)*:

Date of Adoption *(mm/dd/yyyy)*	Place of Final Adoption *(City/State or Country)*
Date Legal Custody Began *(mm/dd/yyyy)*	**Date Physical Custody Began** *(mm/dd/yyyy)*

H. Did you have to be re-adopted in the United States? ☐ No ☐ Yes *(Please complete the following information)*:

Date of Final Adoption *(mm/dd/yyyy)*	Place of Final Adoption *(City/State)*
Date Legal Custody Began *(mm/dd/yyyy)*	**Date Physical Custody Began** *(mm/dd/yyyy)*

I. Were your parents married to each other when you were born (or adopted)? ☒ No ☐ Yes

J. Have you been absent from the United States since you first arrived? *(Only for persons born before October 10, 1952, who are claiming U.S. citizenship at time of birth; otherwise, do not complete this section.)* ☐ No ☐ Yes

If yes, complete the following information about all absences, beginning with your most recent trip. If you need more space, use a separate sheet of paper.

Date You Left the United States *(mm/dd/yyyy)*	Date you Returned to the United States *(mm/dd/yyyy)*	Place of Entry Upon Return to the United States

Part 4. Information About U.S. Citizen Father (or Adoptive Father). *(Complete this section if you are claiming citizenship through a U.S. citizen father. If you are a U.S. citizen father applying for a Certificate of Citizenship on behalf of your minor biological or adopted child, provide information about yourself below.)*

A. Current legal name of U.S. citizen father.

Family Name *(Last Name)*	Given Name *(First Name)*	Full Middle Name *(If applicable)*
FLORES	RUBEN	TRINIDAD

B. Date of Birth *(mm/dd/yyyy)*	**C. Country of Birth**	**D. Country of Nationality**
12/25/1957	MEXICO	UNITED STATES

E Home Address – Street Number and Name *(If deceased, so state and enter date of death)* | Apartment Number

[HOME ADDRESS OMITTED]

City	County	State/Province	Country	Zip/Postal Code
PARACHUTE	GARFIELD	CO	USA	81635

F. U.S. citizen by:

- ☐ Birth in the United States
- ☒ Birth abroad to U.S. citizen parent(s)
- ☐ Acquisition after birth through naturalization of alien parent(s)
- ☐ Naturalization

Date of Naturalization *(mm/dd/yyyy)* | Place of Naturalization *(Name of Court and City/State or USCIS or Former INS Office Location)*

Certificate of Naturalization Number | Former "A" Number *(If known)*

G. Has your father ever lost U.S. citizenship or taken any action that would cause loss of U.S. citizenship?

☒ No ☐ Yes *(Provide full explanation on a separate sheet(s) of paper.)*

H. Dates of Residence and/or Physical Presence in the United States *(Complete this only if you are an applicant claiming U.S. citizenship at time of birth abroad)*

Provide the dates your U.S. citizen father resided in or was physically present in the United States. If you need more space, use a separate sheet(s) of paper.

From *(mm/dd/yyyy)*	To *(mm/dd/yyyy)*
05/18/1959	1961
1963	Present

I. Marital History

1. How many times has your U.S. citizen father been married (including annulled marriages)? 1
2. Information about U.S. citizen father's current spouse:

Family Name *(Last Name)*	Given Name *(First Name)*	Full Middle Name *(If applicable)*
GOMEZ	JUANA	MONTES
Date of Birth *(mm/dd/yyyy)*	**Country of Birth**	**Country of Nationality**
01/27/1964	MEXICO	MEXICO

Home Address – Street Number and Name: [HOME ADDRESS OMITTED]

Apartment Number:

City	County	State/Province	Country	Zip/Postal Code
PARACHUTE	GARFIELD	CO	USA	81635

Date of Marriage *(mm/dd/yyyy)*: 08/05/1990

Place of Marriage *(City, State or Country)*: NATIONAL CITY, CALIFORNIA

Spouse's Immigration Status:
☐ U.S. Citizen ☒ Lawful Permanent Resident Other *(Explain)*:

3. Is your U.S. Citizen father's current spouse also your mother? ☒ No ☐ Yes

Part 5. Information About Your U.S. Citizen Mother (or Adoptive Mother). *(Complete this section if you are claiming citizenship through a U.S. citizen mother (or adoptive mother). If you are a U.S. citizen mother applying for a Certificate of Citizen-*

ship on behalf of your minor biological or adopted child, provide information about yourself below).

A. Current legal name of U.S. citizen mother.

Family Name *(Last Name)* | Given Name *(First Name)* | Full Middle Name *(If applicable)*

B. Date of Birth ***(mm/dd/yyyy)*** | **C. Country of Birth** | **D. Country of Nationality**

E. Home Address – Street Number and Name *(If deceased, so state and enter date of death)* | Apartment Number

City | **County** | **State/Province** | **Country** | **Zip/Postal Code**

F. U.S. citizen by:

- ☐ Birth in the United States
- ☐ Birth abroad to U.S. citizen parent(s)
- ☐ Acquisition after birth through naturalization of alien parent(s)
- ☐ Naturalization

Date of Naturalization *(mm/dd/yyyy)* | Place of Naturalization *(Name of Court and City/State or USCIS or Former INS Office Location)*

Certificate of Naturalization Number | Former "A" Number *(If known)*

G. Has your mother ever lost U.S. citizenship or taken any action that would cause loss of U.S. citizenship?

☐ No ☐ Yes *(Provide full explanation on a separate sheet(s) of paper.)*

H. Dates of Residence and/or Physical Presence in the United States *(Complete this only if you are an applicant claiming U.S. citizenship at time of birth abroad)*

Provide the dates your U.S. citizen father resided in or was physically in the United States. If you need more space, use a

separate sheet(s) of paper.

From *(mm/dd/yyyy)*	To *(mm/dd/yyyy)*

I. Marital History

1. How many times has your U.S. citizen mother been married (including annulled marriages)?

2. Information about U.S. citizen mother's current spouse:

Family Name *(Last Name)* | Given Name *(First Name)* | Full Middle Name *(If applicable)*

Date of Birth *(mm/dd/yyyy)* | Country of Birth | Country of Nationality

Home Address – Street Number and Name | Apartment Number

City | County | State/Province | Country | Zip/Postal Code

Date of Marriage *(mm/dd/yyyy)* | Place of Marriage *(City, State or Country)*

Spouse's Immigration Status:
☐ U.S. Citizen ☐ Lawful Permanent Resident Other *(Explain)*

3. Is your U.S. Citizen mother's current spouse also your father? ☐ No ☐ Yes

Part 6. Information About Military Service of U.S. Citizen Parent(s). *(Complete this only if you are an applicant claiming U.S. citizenship at time of birth abroad)*

1. Has your U.S. citizen parent(s) served in the armed forces? ☒ No ☐ Yes
2. If "Yes," which parent? ☐ U.S. Citizen Father ☐ U.S. Citizen Mother

3. Dates of Service. *(If time of service fulfills any of required physical presence, submit evidence of service.)*

From *(mm/dd/yyyy)*	To *(mm/dd/yyyy)*	From *(mm/dd/yyyy)*	To *(mm/dd/yyyy)*

4. Type of discharge. ☐ Honorable ☐ Other than Honorable ☐ Dishonorable

Part 7. Signature.

I certify, under penalty of perjury under the laws of the United States, that this application and the evidence submitted with it is all true and correct. I authorize the release of any information from my records, or my minor child's records, that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit I am seeking.

Applicant's Signature	Printed Name	Date
/s/ Ruben Flores	RUBEN FLORES-VILLAR	09/22/2006

Part 8. Signature of Person Preparing This Form, If Other Than Applicant.

I declare that I prepared this application at the request of the above person. The answers provided are based on information of which I have personal knowledge and/or were provided to me by the above-named person in response to the questions contained on this form.

Preparer's Signature	Preparer's Printed Name	Date *(mm/dd/yy)*
/s/ E. Barros	Elizabeth M. Barros, Esq.	09/22/2006

Name of Business/Organization *(If applicable)*	Preparer's Daytime Phone Number
FEDERAL DEFENDERS OF SAN DIEGO, INC.	(619) 685-3701

Preparer's Address – Street Number and Name

225 BROADWAY, SUITE 900

City	County	State	Zip Code
SAN DIEGO	SAN DIEGO	CA	92101

NOTE: Do not complete the following parts unless a USCIS officer instructs you to do so at the interview.

Part 9. Affidavit.

I, the (applicant, parent or legal guardian) _____ do swear or affirm, under penalty of perjury laws of the United States, that I know and understand the contents of this application signed by me, and the attached supplementary pages number (___) to (___) inclusive, that the same are true and correct to the best of my knowledge, and that corrections number (___) to (___) were

made by me or at my request.

Signature of parent, guardian or applicant

Date *(mm/dd/yy)*

Subscribed and sworn or affirmed before me upon examination of the applicant (parent, guardian) on _____ at _____

Signature of Interviewing Officer

Title

Part 10. Officer Report and Recommendation on Application for Certificate of Citizenship.

On the basis of the documents, records and the testimony of persons examined, and the identification upon personal appearance of the underage beneficiary, I find that all the facts and conclusions set forth under oath in this application are ☐ true and correct; that the applicant did ☐ derive or acquire U.S. citizenship on _____ *(mm/dd/yyyy)*, through *(mark "X" in appropriate section of law or, if section of law not reflected, insert applicable section of law in "Other" block)*: ☐ **section 301 of the INA** ☐ **section 309 of the INA** ☐ **section 320 of the INA** ☐ **section 321 of the INA** ☐ **Other** _____ and that (s)he ☐ *has* ☐ *has not* been expatriated since that time. I recommend that this application be ☐ *granted* ☐ *denied* and that ☐ *A* or ☐ *AA* Certificate of Citizenship be issued in the name of _____.

District Adjudication Officer's Name and Title

District Adjudication Officer's Signature

I do ☐ do not ☐ concur in recommendation of the application.

District Director or Officer-in-Charge Signature

Date *(mm/dd/yyyy)*

EXHIBIT LIST

DOCUMENTS ESTABLISHING UNITED STATES CITIZENSHIP OF APPLICANT'S FATHER

Certificate of Citizenship for Ruben Trinidad Flores, Applicant's father: ..... Exhibit A

Oath of Allegiance taken Ruben Trinidad Flores, Applicant's father: ..... Exhibit B

DOCUMENTS ESTABLISHING RESIDENCE OF APPLICANT'S FATHER

Declaration of Ruben Trinidad Floresvillar-Sandez, Applicant's father: ..... Exhibit C

Declaration of Eva Carolina Sandez, Applicant's grandmother: ..... Exhibit D

Application for Immigrant Visa and Alien Registration, dated May 13, 1959: ..... Exhibit E

Immigrant Visa and Alien Registration showing arrival of Applicant's father in United States May 18, 1959: ..... Exhibit F

Grant Deed dated August 1, 1966 ..... Exhibit G

Secured Property Tax Bill – County of San Diego, Assessed On March 1, 1968: ..... Exhibit H

Oral Decision of Immigration Judge finding dated January 23, 1980, finding Applicant's father "had been in the United States for all of his life practically": ..... Exhibit I

Social Security Records for Ruben T. Flores, Applicant's father: ..... Exhibit J

DOCUMENTS ESTABLISHING PATERNITY/ LEGITIMATION/LEGAL CUSTODY

Amended Birth Certificate for Ruben Negrete-Vazquez, showing Applicant's correct date of birth to be October 7, 1974: ..... Exhibit K

Letter to Border Authorities from University Hospital, San Diego, CA showing that Applicant was admitted to the Special Care Nursery on December 15, 1974 and requesting visa for him on behalf of his father: ..... Exhibit L

Hospital Infant Release Report, signed by Mercedes Negrete on December 31, 1974, authorizing release to Eva Carolina Sandez Flores Villar, residing at 3785 C Street, San Diego, California: ..... Exhibit M

Certificate of Baptism for Ruben Flores Villar showing that he was baptized on January 2, 1975 at the Church of Our Lady of Guadalupe in San Diego, CA: ..... Exhibit N

Boy, 7, recovering from rare parasite disorder, San Diego Union Tribune (1981), article discussing Applicant's health: ..... Exhibit O

Certificate of Child Acknowledgment showing that Ruben Trinidad Flores Villar Sandez recognized Ruben Flores Villar Negrete as his legitimate son on June 2, 1985: ..... Exhibit P

Letter from Chula Vista City School District showing that Applicant attended Harborside Elementary School and listing parents as Ruben and Juana M. Flores, dated February 8, 1988: ..... Exhibit Q

Certificate of Promotion, certifying that Applicant was promoted to Junior High, dated June 21, 1988: ..... Exhibit R

Tax Returns for years 1983, 1989-1991 showing that Ruben T. Flores claimed Applicant as his son: ..... Exhibit S

DOCUMENTS ESTABLISHING APPLICANT'S LAWFUL ADMISSION TO THE UNITED STATES

Application for Temporary Residence, filed March 4, 1988: ..... Exhibit T

Temporary Residence Card, Issue Date March 5, 1988: ..... Exhibit U

Application to Adjust from Temporary to Permanent Residence, March 1990: ..... Exhibit V

* * *

EXHIBIT C

DECLARATION OF RUBEN TRINIDAD FLORESVILLAR-SANDEZ

I, Ruben Trinidad Floresvillar-Sandez, declare as follows:

1. I am the father of Ruben Flores-Villar (aka: Ruben Floresvillar Negrete).

2. I was born on December 25, 1957 in Tijuana, Mexico. Although I was born in Mexico, I acquired United States citizenship through my mother, Eva Carolina Sandez de Floresvillar (maiden name: Eva Carolina Sandez-Machado), who was born in San Diego, California. I received my Certificate of Citizenship, No. AA616135, on May 24, 1999. It shows that I became a U.S. citizen on December 25, 1957, the day I was born.

3. My mother lived in the United States from the time of her birth until she was six years old. When she was about six years old, she moved to Tijuana, Mexico, where she eventually met my father, Luis Enrique Floresvillar.

4. When I was less than a year old, my parents got married. On May 18, 1959, I was admitted to the United States as an immigrant. At that time, I moved to the United States with my mom.

5. From 1963 until 1965 we lived at [Home Address Omitted In Printing], San Diego, California, 92101. Jack Wirottle and his wife Margaret owned the

property and also lived there. My grandmother, Josepha Eva Machado Brown, was Margaret's cousin.

6. In 1965, my mother purchased a home located at [Home Address Omitted In Printing], San Diego, California, 92102. I grew up in that home and attended Chollas Elementary School, located at 47th Street and Market Street.

7. As a child, my mother and father separated and got back together numerous times. My mother always had her home in the United States and my father had his home in Tijuana. My father would live with us in San Diego for awhile and then move back to Tijuana, Mexico. When my father would leave, he would sometimes take me and my siblings to Tijuana with him without our mother's permission or ours. Our mother would come get us and bring us back to San Diego. My principle residence was with my mother in San Diego where I spent most of my time. Although I would see my father in Tijuana, I was never outside the United States for more than a few months.

8. While visiting my father in Tijuana, I met and became romantically involved with Mercedes Negrete. Ms. Negrete and I had two children together, Ruben and Griselda. During our relationship, Ms. Negrete lived in Tijuana with her parents and I lived in San Diego with my mother.

9. Ruben was born on October 7, 1974. Unfortunately, when Ruben was born, he was not healthy. He weighed only three pounds and was very sick. When Ruben was only two months old, my mother and I

brought him to the United States to receive medical treatment. After Ruben was released from the hospital, he came to live with me at my Mother's house on [Home Address Omitted In Printing]. Ruben's mother agreed to this arrangement. For the first seven years of Ruben's life, he was in and out of the hospital.

10. I continued to date Ms. Negrete for a short period of time, during which time she became pregnant with Griselda. After Griselda was born, Ms. Negrete got together with another man and distanced herself from me and Ruben. As a result, Griselda grew up with Ms. Negrete and Ruben grew up with me, my mother, and my siblings in San Diego and Chula Vista, California.

11. As a child, Ruben had very little contact with his biological mother. In fact, during the first eighteen years of his life, he probably had contact with her only three or four times on the telephone. From the time he was a few months old, Ruben lived with my family and attended school in the San Diego area. Eventually, he had children of his own, all of whom were born in the United States.

12. In 1976, I moved from my mother's home on [Home Address Omitted In Printing] in San Diego to Chula Vista. From 1976 to 1979, I lived at [Home Address Omitted In Printing], Chula Vista, California, 92010.

13. In 1981, I moved back to my mother's home on [Home Address Omitted In Printing]. I lived there until 1985.

14. From 1985 until 1994, I lived at [Home Address Omitted In Printing], Chula Vista, California, 92011.

15. From 1994 to 1997, I lived on [Home Address Omitted In Printing] in Commer City, Colorado, 80022.

16. In 1997, I moved to [Home Address Omitted In Printing], Parachute, Colorado, 81635, where I continue to reside with my wife Juana.

17. My mother still lives at [Home Address Omitted In Printing], San Diego, California, 92102.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Dated: 9-21-06 /s/ Ruben [Illegible]

RUBEN TRINIDAD FLORESVILLAR-SANDEZ

EXHIBIT D

DECLARATION OF EVA CAROLINA FLORESVILLAR

I, Eva Carolina Floresvillar (aka Eva Carolina Sandez), declare:

1. I am a United States citizen by birth. I resided in the United States at [Home Address Omitted In Printing] in San Diego, CA continuously until I was about six years old. When I was about six years old I moved with my mother to Tijuana, Mexico. Shortly after moving to Tijuana my father came and told me we were going to visit my aunts. He took me to Long Beach, CA where he left me with my aunts for about one year.

2. When I was about seven years old my father took me back to Tijuana, Mexico. I lived in Tijuana until I was a teenager.

3. When I was somewhere between 12 or 14 years old I returned to the United States with my mother. However, after a few years we returned to Tijuana, Mexico where I eventually met and became romantically involved with Luis Enrique Floresvillar. Luis Enrique Floresvillar is the father of all of my children.

4. I am the mother of Ruben Trinidad Floresvillar-Sandez ("Ruben T."). Ruben T. was born in Tijuana, Mexico. At the time, I was not married. Shortly after Ruben T.'s birth his father and I were married.

5. When Ruben T. was about a year old I moved to Los Angeles with my husband and children. We

lived in Los Angeles from 1959 to 1961. From Los Angeles, we moved back to Tijuana, Mexico for about a year and a half.

6. Ruben T.'s father was very abusive toward me. In 1963, I left Ruben T.'s father and moved with my children (including Ruben T.) to the United States. From 1963 to 1965, we lived at [Home Address Omitted In Printing], San Diego, California, 92101 with Jack Wirottle and his wife Margaret.

7. Although I would get back together with Ruben T.'s father, he would quickly become abusive again and I would leave him. This cycle continued for several years.

8. In 1965, I purchased a home on [Home Address Omitted In Printing] in San Diego, California. Although Ruben T.'s father lived with us off and on, it was always the same thing over and over again. When his father would leave, he would sometimes take the children to Tijuana without my permission and I would have to go to Tijuana to retrieve them. Although Ruben T. would see his father in Tijuana, he lived primarily with me and attended school in San Diego.

9. On several occasions I filed for child support, however, I would take the papers to Ruben T.'s father and he would rip them up.

10. In 1974, Ruben T. became a father. His girlfriend, Mercedes Negrete, was only six months pregnant when she went into labor. As a result, my grandson, Ruben Flores-Villar (aka: Ruben Floresvillar-Negrete), was born premature. In fact, at the

time of his birth, he weighed only 2-3 pounds and had significant medical problems. The doctors at the hospital in Tijuana advised me to bring Ruben to the United States so that he could obtain medical treatment. I followed the doctor's advice and brought Ruben to the United States to obtain treatment. The doctors here in the United States gave me a form to bring to Ruben's mother so that he could be released to me. She freely signed the form allowing Ruben to be released to my custody.

11. When Ruben's health improved, I offered to take him back to his mother, but by that time she had gotten together with another man, and was not interested in raising him. As a result, he grew up with me and my children. Although I am Ruben's grandmother, he is just like a son to me.

12. Ruben has lived in the United States since he was only two months old. He attended school here and has children of his own who were born in the United States. Ruben is an intelligent young man who has a good heart. If he is granted citizenship, I believe that he will be a productive member of society.

I declare under penalty of perjury that the following is true and correct to the best of my knowledge and recollection.

DATED: September 22, 2006

/s/ Eva Carolina Floresvillar
EVA CAROLINA FLORESVILLAR

* * *

EXHIBIT K

[TRANSLATION]

In accordance with the date of March 8, 1988, File Number 052/88 enacted by the civil Registry Dept. pursuant to Section 135-B valid in the State, modifies the correct date of birth for the registered person [illegible] OCTOBER 7, 1974 ON RECORD. Tijuana, Baja California April 19, 1991. Officer of the Civil Registry.

Signature [Illegible]
Patricia L. Ortega de Sanders

[SEAL]

Department of National Defense [Illegible] Recruitment [Illegible]
Tijuana, B.C.

Control No. 13401

[SEAL]

UNITED STATES OF MEXICO
GOVERNMENT OF THE
FREE AND SOVEREIGN STATE
OF BAJA CALIFORNIA
CIVIL REGISTRY

BIRTH CERTIFICATE

CERTIFICATE COPY NO. 1
020040182170320

INDIVIDUAL NATIONAL IDENTIFICATION CODE
0|2|0|0|4|0|1|1|8|2|1|1|7|0|3|2|1|0

CIVIL REG. OFFICE No.	BOOK No. 26	CERTIFICATE No. *3861*	LOCALITY Tijuana	DATE OF REGISTRY		
01				MONTH	DAY	YEAR
MUNICIPALITY OR AGENCY Tijuana			STATE B.C.	21	06	82

RECORDED BIRTH

GENDER: MALE XX FEMALE

NAME RUBEN NEGRETE VAZQUEZ

DATE OF BIRTH OCTOBER 7, 1975 TIME 21.25

PLACE OF BIRTH Tijuana Tijuana B.C.

BROUGHT FORTH: ALIVE XX DECEASED REPORT OF BIRTH No. NON SUBMITTED

THERE APPEARED: THE FATHER ___ THE MOTHER XX BOTH ___ OTHER ___

PARENTS

FATHER'S NAME ========== CITIZENSHIP ========== AGE ====
ADDRESS ========== PLACE OF BIRTH ==========
MOTHER'S NAME Maria Merced Negrete Vázquez CITIZENSHIP Mexican AGE 23
ADDRESS C. Rancho Alegre #366 Col. 20 de Noviembre PLACE OF BIRTH Mexicali, Baja California

GRANDPARENTS

PATERNAL GRANDFATHER ========== CITIZENSHIP ==========
PATERNAL GRANDMOTHER ========== CITIZENSHIP ==========
ADDRESS(ES) ==========
MATERNAL GRANDFATHER Luis Negrete Contreras CITIZENSHIP Mexican
MATERNAL GRANDMOTHER Juana Vázquez Zaragoza CITIZENSHIP Mexican
ADDRESS(ES) Ave. Negrete #1029 Centro

WITNESSES

NAME Carolina Flores Villar CITIZENSHIP Mexican AGE 42
ADDRESS San Diego, California
NAME Jose Benedicto Garcia CITIZENSHIP Mexican AGE 21
ADDRESS HERREROS SUR. No. 1778

PERSON, OTHER THAN PARENTS, WHO BRINGS FORTH THE INDIVIDUAL WHOSE BIRTH IS RECORDED

NAME RELATIONSHIP AGE
ADDRESS

SIGNATURES OF THE PARENTS, OR OF THE PERSON OTHER THAN THE PARENTS, WHO BRINGS FORTH THE INDIVIDUAL WHOSE BIRTH IS RECORDED

[signed]: Ma. Mercedes Negrete Vázquez 1 [*illegible signature*]

SIGNATURES OF THE WITNESSES

[*illegible signature*] 1 [*illegible signature*]

FINGERPRINT OF THE PERSON RECORDED [there appears a small blurred mark at lower left]	THIS CERTIFICATION WAS READ AND PURSUANT TO ITS CONTENTS, IT IS RATIFIED AND SIGNED BY THOSE WHO PARTICIPATED AND KNOW HOW TO SIGN, THOSE WHO DO NOT, AFFIX THEIR FINGERPRINT, IN WITNESS WHEREOF. OFFICER ___ OF THE CIVIL REGISTRY [unintelligible GUILLERMO CABALLERO SOSA NAME [*illegible signature*] SIGNATURE	SEAL OF THE OFFICE OF THE CIVIL REGISTRY STATE COURT CIVIL REGISTRY [SEAL] Tijuana, State of Baja California

THIS CERTIFICATE HAS THE FOLLOWING ANNOTATIONS ATTACHED:

[The above is a true and correct translation from Spanish into English, performed to the best of my knowledge and belief. This two-page translation pertains to a one page-copy of a Birth Certificate issued for Ruben Negrete VazquezZ. Lilia Ramirez, Interpreter, Federal Defenders of San Diego, June 21, 2006.]

EXHIBIT L

[SEAL] **UNIVERSITY HOSPITAL**
San Diego, California

PROGRESS RECORD

DATE	
	To the Border Authorities:
	Ruben Flores is a two month old
	premature baby who was admitted today
	(December 15, 1974) to University Hospital
	Special Care Nursery very seriously ill. We
	believe he has a blood infection or
	tuberculosis meningitis.
	Ruben's father would like to obtain a
	border permit for the infant so that
	University Hospital will pay for some of his
	care.
	Thank you,
	Dr. TA Soulé
	Pediatrics
	University Hospital
	225 W Dickerson
	San Diego, Ca

EXHIBIT M

HOSPITAL INFANT RELEASE REPORT

Send original to: State Department of Social Welfare
746 P Street
Sacramento, California 95814

(Prepare original and 3 copies)

[Illegible] within 48 hours as required by W&IC, Section 10002; [illegible] copies for hospital file, natural parent, and [illegible] receiving child.

PARENT'S AUTHORIZATION

(Fill out completely before parent signs. Alterations or deletions invalidate form.)

I, MERCEDES NEGRETE DE FLORES VILLAR, the parent of x Ruben Flores Villar

born to me at Tijuana Baja Hospital on x two forty [illegible] authorize said hospital to release my child to Eva Carolina Sandez Flores Villar, residing (complete address) [Home Address Omitted In Printing]. In releasing my child from said hospital for the purpose of ☑ Adoption Planning, ☐ Foster Care, ☐ Other (Explain) _____, *I retain all parental rights to his/her custody and control. This only authorizes release of my child from the hospital. It is not a consent or relinquishment of my child for adoption.*

[Illegible], Dec. 31, 1974, **********

(Witness) (Date) (Signature of parent, even if minor, or person having legal custody of the child)
Mercedes Negrete

ACKNOWLEDGMENT BY PERSON(S) RECEIVING CHILD

I/we have on this date 1-2-75 received (child's name) Ruben Flores

for the purpose of ☑ Adoption Planning, ☐ Foster Care, ☐ Other

(Explain) _____

I/we understand that this only authorizes release of this child from the hospital. This is not a consent or relinquishment of this child for adoption.

Marjorie Johnston, 2/75, x Carolina Flores V

(Witness) (Date) (Signature of person receiving child)

_____
(Address)

Identification of Person(s) receiving child [ID Number Omitted], _____, state _____

REPORT OF HOSPITAL Other _____

_____ _____
(Name of Hospital) (Address)

_____ _____ _____
(Name of Attending Physician) (Mother's Admission Date) (Discharge Date)

Father's Name (Mother's Address)

Mother's Name (Father's Address)

Sex of Child: ☒ Male ☐ Female

(Signature of Administrator or Designated Representative)

MEDICAL AUTHORIZATION

I authorize and empower the person(s) named in Section I to make any provisions for medical and surgical care for my child identified on this report, including anaesthesia, which may be deemed necessary or advisable by any licensed physician for a period not to exceed three months from the date of my child's release from this hospital.

[Illegible]	12/31-74	x Mercedes Negrete [Illegible]
(Witness)	(Date)	(Signature of parent, or person having legal custody of child)

([Illegible]/72) Escritora Publica [Illegible]
QUETZALCOATL NO. 1 TIJUANA

EXHIBIT N

CERTIFICATE OF BAPTISM

[LOGO] CHURCH OF OUR LADY
OF GUADALUPE
1770 Kearney Avenue
San Diego, California 92113

THIS IS TO CERTIFY

That: Ruben Flores Villar

Child of: Ruben Flores Villar Sanchez

and: Mercedes Negrete Vazquez

born in: Tijuana, Mx

on the: 07 day of: October 1974

and was Baptized on January 02, 1975

According to the Rites of the Roman Catholic Church

by the Rev.: John C. Wright S.J.

the sponsors being: Norma Machado

[Illegible]:

Dated: March 28, 2003

REV.: /s/ R Hyatt Brown SJ Pastor/Assistant

* * *

EXHIBIT P

[TRANSLATION]

[SEAL]

UNITED STATES OF MEXICO
GOVERNMENT OF THE
FREE AND SOVEREIGN STATE
OF BAJA CALIFORNIA
CIVIL REGISTRY

Control No. 0168

CERTIFICATE OF CHILD ACKNOWLEDGMENT

INDIVIDUAL NATIONAL IDENTIFICATION CODE

CIVIL REG. OFFICE No. 01	BOOK No. ___	CERTIFICATE No. 168	LOCALITY TIJUANA	DATE OF REGISTRY		
				DAY	MONTH	YEAR
MUNICIPALITY OR AGENCY TIJUANA			STATE Baja California	02	06	85

PERSON BEING ACKNOWLEDGED

GENDER: MALE x FEMALE ___

NAME RUBEN FLORES VILLAR NEGRETE

DATE OF BIRTH OCTOBER 7, 1975 AGE 10

PLACE OF BIRTH TIJUANA TIJUANA BAJA CALIFORNIA

ADDRESS: Callejon del Carmen #518 Col. 20 de Noviembre TIJUANA, B.Cfa.

ACKNOWLEDGING PARTY

NAME Ruben Trinidad Flores Villar Sandez CITIZENSHIP Mexican AGE 27

ADDRESS Callejon del Carmen #518 Col. 20 de Noviembre [illegible]

PARENTS OF THE ACKNOWLEDGING PARTY

FATHER Luis Enrique Flores Villar CITIZENSHIP [illegible]

MOTHER Eva Carolina Sandez Machado CITIZENSHIP [illegible]

ADDRESS(ES) ---

PERSON(S) GRANTING CONSENT

NAME Maria Merced Negrete Vazquez CITIZENSHIP Mexican AGE 26

MARITAL STATUS Single RELATIONSHIP TO PERSON BEING ACKNOWLEDGED Mother

ADDRESS C. Rancho Alegre Col. 20 de Noviembree Cd

WITNESSES

NAME Juana Montes Gómez CITIZENSHIP Mexican AGE 32

ADDRESS Callej. Del Carmen #518 Col. 20 de N.v. Cd.

NAME Jose Rodriguez CITIZENSHIP Mexican AGE 26

ADDRESS Col. 20 de Noviembre Cd

SIGNATURES

[signed:] x Ruben Flores Villar
Person being Acknowledged

1 x [illegible signature]
Person Acknowledging

SIGNATURES OF THE PERSONS GRANTING CONSENT

[signed:] Ma. Mercedes Negrete Vazquez

SIGNATURES OF THE WITNESSES

[signed:] Juana Montes Gomez

[signed:] Jose Rodriguez

FINGERPRINT OF THE ACKNOWLEDGED PERSON [there appears a blurred mark]. RIGHT THUMB	THIS CERTIFICATION WAS READ AND PURSUANT TO ITS CONTENTS, IT IS RATIFIED AND SIGNED BY THOSE WHO PARTICIPATED AND KNOW HOW TO SIGN, THOSE WHO DO NOT, AFFIX THEIR FINGERPRINT, IN WITNESS WHEREOF. OFFICER 1 OF THE CIVIL REGISTRY MANUEL GASTELUM MILLAN [illegible signature] NAME SIGNATURE	SEAL OF THE OFFICE OF THE CIVIL REGISTRY [stamped seal:] CIVIL REGISTRY [MEXICAN NATIONAL EMBLEM] MEXICALI, STATE OF BAJA [Illegible]

THIS CERTIFICATE HAS THE FOLLOWING ANNOTATIONS ATTACHED:.	CERTIFICATE CHILD RECOGNITION]	
Initial registration carried out only by the mother.	BOOK NUM. 26	FOJA 3861
	BATCH 3861	DATE 22-06-82
	TOWN	

INTERESTED PARTIES

[The above is a true and correct translation from Spanish into English, performed to the best of my knowledge and belief. This two-page translation pertains to a one page copy of a Birth Certificate issued for Ruben Flores Villar.
Lilia Ramirez, Federal Defenders of San Diego Interpreter, June 21, 2006.]

* * *

EXHIBIT Q

[SEAL] CHULA VISTA CITY SCHOOL DISTRICT

Each child is an individual of great worth

HARBORSIDE COMMUNITY SCHOOL
681 NAPLES STREET •
CHULA VISTA, CALIFORNIA • 92011 •
AC 714 422-8365

February 8, 1988

TO WHOM IT MAY CONCERN:

According to our records Ruben Flores, BD 10-7-74, first enrolled at Harborside Elementary School on 10-22-87. Records received from Chollas School in San Diego indicate that he was a student there from 11-27-79, when he entered Kindergarten, until he transferred to Harborside School. He is presently enrolled in the sixth grade.

Parents: Ruben & Juana M. Flores
1424 Broadway # 22
Chula Vista, Calif. 92011.

/s/ W W Hall
Wm. W. Hall, Ed.D.
Principal
Harborside School

* * *

EXHIBIT S

Department of the Treasury – Internal Revenue Service

[Tax Returns for Years 1983, 1989-1991 Showing That Ruben T. Flores Claimed Applicant as His Son]

1983 Form 1040A US Individual Income Tax Return (0) **OMB No. 15.**

Step 1
Name and address

Use the IRS mailing label. If you don't have a label, print or type:

Your first name and initial (if joint return, also give spouse's name and initial): Ruben T. Flores

Last Name

Your social security

Present home address (number and street): [HOME ADDRESS OMITTED]

Spouses social security

City, town or post office, State, and ZIP code: San Diego, CA., 92102

Presidential Election Campaign Fund

Do you want $1 to go to this fund? ☐ Yes ☐ No

If joint return, does your spouse want $1 to go to this fund? ☐ Yes ☐ No

Step 2
Filing status
(Check only one)

1 ☐ Single (See if you can use Form 1040EZ.)

2 ☐ Married filing joint return (even if only one had income)

3 ☐ Married filing separate return. Enter spouse's social security number above and spouse's full name here.

4 ☒ Head of household (with qualifying person). If the qualifying person is your unmarried child but not your dependent, write this child's name here. Ruben

Exemptions

Always check the exemption box labeled Yourself. Check other boxes if they apply.

5a. ☒ Yourself ☐ 65 or over ☐ Blind

b ☐ Spouse ☐ 65 or over ☐ Blind

Write number of boxes checked on 5a and b 1

c First names of your dependent children who lived with you. Ruben; Graciela

Write number of children listed on 5c 2

* * *

FORM 1040

Department of the Treasury - Internal Revenue Service
U.S. Individual Income Tax Return 1989

COPY

Label

For the year Jan. –Dec. 31, 1989 or other tax year beginning , 1989, ending , 19 . OMB No. 1545-0074

Use IRS' label. Otherwise please print or type.

Your first name and initial	Last name	Your social security number
RUBEN T. FLORES		[Social Security Number Omitted]
If a joint return, spouse's first name and initial	Last name	Spouse's social security number
JUANA M. FLORES		[Social Security Number Omitted]
Home address (number and street. (If a P.O. box, see page 7 of instructions.) [Home Address Omitted]	Apt. no.	**For Privacy Act and Paperwork Reduction Act Notice, see instructions.**
City, Town or post office, state and ZIP code. (If a foreign address, see page 7.) CHULA VISTA, CA 92011		

Presidential Election Campaign

▶ Do you want $1 to go to this fund?	Yes		X	No
If joint return, does your spouse want $1 to go to this fund?	Yes		X	No

Note: Checking "Yes" will not change your tax or reduce your refund.

Filing Status

Check only one box.

1		Single
2	X	Married filing joint return (even if only one had income)
3		Married filing separate return. Enter spouse's social security no. above & name here:
4		Head of household (with qualifying person). (See page 7 of instructions.) If the qualifying person is your child but not your dependent, enter child's name here:
5		Qualifying widow(er) with dependent child (year spouse died ▶ 19). (See page 7 of instructions.)

Exemptions

6a	☒	Yourself. If someone (such as your parent) can claim you as a dependent on his or her return, do not check box 6a. But be sure to check the box on line 33b on page 2.....
b	☒	Spouse .....

} No. of boxes checked on 6a and 6b 2

See instructions on page 8.)

If more than 6 dependents, see instructions on page 8.

c **Dependents:** (1) Name (first, initial, and last name)	(2) Check if under age 2	(3) If age 2 or older, dependent's social security number	(4) Relationship	(5) No. of mos. lived at home
RUBEN FLORES, JR.		[OMITTED]	SON	12
MIGUEL A. FLORES		IN PROCESS	SON	12
CLAUDIA FLORES		IN PROCESS	DAUGHTER	12

No. of your children on 5c who:

- lived with you 3
- didn't live with you due to divorce or separation
- No. of other dependents on 6c

d If your child didn't live with you but is your dependent under a pre-1985 agreement, check here. ▸ ☐

e Total number of exemptions claimed ..... Add numbers entered on lines above 5

* * *

FORM **1040**

Department of the Treasury - Internal Revenue Service
U.S. Individual Income Tax Return 1990

Label (See instructions on page 8.)

For the year Jan. – Dec. 31, 1990 or other tax year beginning , 1990, ending , 19 . OMB No. 1545-0074

Your first name and initial RUBEN T. FLORES	Last name	Your social security number [Social Security Number Omitted]
If a joint return, spouse's first name and initial JUANA M. FLORES	Last name	Spouse's social security number [Social Security Number Omitted]
Home address (number and street. (If you have a P.O. box, see page 8 of instructions.) Apt. no. [Home Address Omitted]		**For Privacy Act and Paperwork Reduction Act Notice, see instructions.**
City, Town or post office, state and ZIP code. (If you have a foreign address, see page 8.) CHULA VISTA, CA 91911		

Use IRS label. Otherwise please print or type.

Presidential Election Campaign (See page 9.)

	Yes	No	
Do you want $1 to go to this fund?		X	**Note: Checking "Yes" will not change your tax or reduce your refund.**
If joint return, does your spouse want $1 to go to this fund?		X	

Filing Status

Check only one box.

1		Single (See page 10 to find out if you can file as head of household.)
2	X	Married filing joint return (even if only one had income)
3		Married filing separate return. Enter spouse's soc. sec. no. above & full name here. ▶
4		Head of household (with qualifying person). (See page 10.) If the qualifying person is your child but not your dependent, enter this child's name here. ▶
5		Qualifying widow(er) with dependent child (yr. spouse died ▶ 19). (See page 10.)

Exemptions

6a	☒	Yourself. If your parent (or someone else) can claim you as a dependent on his or her tax return, do not check box 6a. But be sure to check the box on line 33b on page 2.
b	☒	Spouse

No. of boxes checked on 6a and 6b: 2

See instructions on page 10.)

If more than 6 dependents, see instructions on page 11.

c **Dependents:** (1) Name (first, initial, and last name)	(2) Check if under age 2	(3) If age 2 or older, dependent's social security number	(4) Relationship to you	(5) No. of mos. lived in home in '90
RUBEN FLORES, Jr.		[OMITTED]	SON	12
MIGUEL A. FLORES			SON	12
CLAUDIA FLORES			DAUGHTER	12

No. of your children on 5c who:

- lived with you 3
- didn't live with you due to divorce or separation (see page 11)
- No. of other dependents on 5c

d If your child didn't live w/ you but is claimed as your dep. under a pre-1985 agreement, check. ▶ ☐

e Total number of exemptions claimed ..... Add numbers entered on lines above 5

FORM **1040** **Department of the Treasury – Internal Revenue Service**
U.S. Individual Income Tax Return (T)1991

COPY

Label (See instructions on page 11.) Use IRS label. Otherwise please print or type.

For the year Jan. – Dec. 31, 1991 or other tax year beginning , 1991, ending , 19 . OMB No. 1545-0074

Your first name and initial RUBEN T. FLORES	Last name	Your social security number [Social Security Number Omitted]
If a joint return, spouse's first name and initial JUANA FLORES	Last name	Spouse's social security number [Social Security Number Omitted]
Home address (number and street). (If you have a P.O. box, see page 11.) [Home Address Omitted]	Apt. no.	**For Privacy Act and Paperwork Reduction Act Notice, see instructions.**
City, town or post office, state and ZIP code. (If a foreign address, see page [illegible].) CHULA VISTA, CA 91911		

Presidential Election Campaign (See page 11.)

	Yes	No	
Do you want $1 to go to this fund?		X	**Note: Checking "Yes" will not change your tax or reduce your refund.**
If joint return, does your spouse want $1 to go to this fund?		X	

Filing Status [Illegible] **Check only one box.**

1 [ ] Single
2 [X] Married filing joint return (even if only one had income)
3 [ ] Married filing separate return. Enter spouse's soc. sec. no. above & full name here ▶
4 [ ] Head of household (with qualifying person). (See page 12.) If the qualifying person is your child but not your dependent, enter child's name here ▶
5 [ ] Qualifying widow(er) with dependent child (year spouse died ▶ 19). (See page 12.)

Exemptions (See page 12.)

6a [☒] Yourself. If your parent (or someone else) can claim you as a dependent on his or her tax return, do not check box 6a. But be sure to check the box on line 33b on page 2.....
b [☒] Spouse .....

No. of boxes checked on 6a and 6b: 2

If more than six c **Dependents:**

(1)	(2) Check	(3) If age 1 or older	(4) Relationship	(5) No. of	No. of your

dependents, see page 13.

(1) Name (first, initial, and last name)	if under age 1	dependent's social security number	to you	mos. lived in home in '91
RUBEN FLORES, JR.		[OMITTED]	SON	12
MIGUEL A. FLORES		[OMITTED]	SON	12
CLAUDIA FLORES		[OMITTED]	DAUGHTER	12

children on 6c who:

- lived with you 3
- didn't live with you due to divorce or separation (see page 14)
- No. of other dependents on 6c

d If your child didn't live with you but is claimed as your dep. under pre-1985 agreement, check ▶ ☐

e Total number of exemptions claimed

Add numbers entered on lines above ▶ 5

EXHIBIT T

U.S. Department of Justice **Immigration and Naturalization Service**	Application for Status (Illegible) (Under Section 245A of the (Illegible)	(Bar Code) A92414360

Please begin with item #1, after carefully reading the instructions. The block below is for Gov (Illegible)

Name and Location (City or Town) of Qualified Designated Entity	Fee Stamp (Mar. 4, 1988 FEE PAID $50.00)
	Fee Receipt No. (This application) (Illegible)
	Principal Applicant's File No. A- .....
Qualified Designated Entity I.D. No.	File No (This application) A-9241436

Applicant: Do not write above this line. See instructions before filling in application. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. *Fill in with typewriter or print in block letters in ink.*

1. I hereby apply for status as indicated by the block checked below (check block A or B).
   - ☒ A Temporary Residence as an alien who illegally entered the U.S. prior to January 1, 1982.
   - ☐ B Temporary Residence as an alien who entered the U.S. as a nonimmigrant prior to January 1, 1982 and whose authorized stay expired before such date or whose unlawful status was known to the Government as of January 1, 1982

2. Family Name (Last Name in CAPITAL Letters)	(First Name)	(Middle Name)	3. Date of Birth (Month Day Year)
FLORES-VILLAR	RUBEN		OCTOBER 07 1974

4. Other Names Used or Known by (including maiden name, if married)	5. Telephone Numbers (Include Area Codes)
NONE	Home: (619) 426-1806 Work:

6. Home Address in the U.S. (No. and Street)	(Apt. No.)	City	(State	ZIP Code
[HOME ADDRESS OMITTED]		CHULA VISTA	CA	92011

7.	Mailing Address in the U.S. (if different from #6) SAME AS ABOVE	(Apt. No.)	(City)	(State) (ZIP Code)
	Last Address outside the U.S. (City or Town) CALLEJON RANCHO ALEGRE, [HOME ADDRESS OMITTED], TIJUANA B.C. MEXICO	(County, Province, State)	(Country)	
9.	Sex ☒ Male Sex ☐ Female	10. Race ☐ Asian or Pacific Islander ☐ Black, not of Hispanic origin ☐ Other (specify below) ☒ Hispanic ☐ White not of Hispanic origin		
11.	Marital Status ☒ Never married ☐ Divorced ☐ Now Married ☐ Separated ☐ Widowed		12. Country of Citizenship MEXICO	
13.	Place of Birth (City or Town) TIJUANA	(County, Province or State) BAJA CALIFORNIA	(Country) MEXICO	
14.	Have you previously applied for temporary residence as a legalization applicant? ☒ No ☐ Yes (if "Yes" give date, place of filing, and final disposition, if known)		15. Do you have any other record with I&NS? ☒ No ☐ Yes (If "Yes" give numbers) A- _____ Other _____	
16.	When did you last come to the U.S.? (Month Day Year) DECEMBER 15 1974		17. Manner of Entry (Visitor, Student, Crewman, etc.) ☐ With visa (visitor, student, etc.) specify _____ ☒ Without visa	
18.	Place of Last Entry ☒ U.S. Port of entry (City and State) SAN YSIDRO CA ☐ Border –Not through port (State) [Illegible]		19. List all Social Security Numbers used. (1) NONE (3) (2) (4)	
20.	Mother's Name (Maiden) (Last) (First) ☒ Living [ILLEGIBLE]		21. Father's Name (Last) (First) ☒ Living [ILLEGIBLE]	

U.S. District Court
Southern District of California

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529

[SEAL] **U.S. Citizenship and Immigration Services**

RUBEN FLORES-VILLAR
808 UNION STEET [sic]
San Diego, CA 92101

File: A92 414 360 Office: SAN DIEGO, CA

Date: MAR 29 2007

IN RE: Applicant: RUBEN FLORES-VILLAR

APPLICATION: Application for Certificate of Citizenship under Sections 309(a) and 301(g) of the Immigration and Nationality Act; as amended, U.S.C. §§ 1409(a) and 1401(g)

ON BEHALF OF APPLICANT:

ELIZABETH M. BARROS
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, SUITE 900
SAN DIEGO, CA 92101

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned

to the office that originally decided your case. Any further inquiry must be made to that office.

/s/ Ellen L. Johnson
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Diego, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on October 7, 1974 in Mexico.[1] The individual identified as the applicant's natural father, Ruben Trinidad Flores Villar Sanchez (Mr. Flores Villar), automatically acquired U.S. citizenship at birth on December 25, 1957 through his U.S. citizen mother, Eva Carolina Flores Villar (Ms. Flores Villar). The applicant's mother, Mercedes Negrete Vazquez, was identified as a Mexican citizen at the time of his birth and the record does not indicate that her nationality has

[1] The record contains a birth certificate and registration that list the applicant's date of birth as October 7, 1975. Although counsel at the time of filing indicated that she was submitting an amended birth certificate to establish the applicant's birth as having occurred on October 7, 1974, that documentation also shows the applicant's date of birth as October 7, 1975. The AAO notes, however, that the applicant's baptismal certificate lists an October 7, 1974 date of birth and that other documentation in the record indicates that the applicant was admitted to San Diego University Hospital in December 1974 as a two month old premature baby. Accordingly, the AAO will accept counsel's claim that the applicant was born on October 7, 1974.

changed. The applicant's parents never married. The applicant seeks a certificate of citizenship pursuant to sections 309 and 301(g) of the Immigration and Nationality Act (the Act), as amended, 8 U.S.C. §§ 1409 and 1401(g), based on the claim that he acquired U.S. citizenship at birth through his natural father.

Based on the evidence of record, the district director determined that the applicant had not established that his father, prior to his birth, had been physically present in the United States for at least ten years, five of which followed his 14th birthday, as required by section 301(a)(7) of the Act. Accordingly, he denied the application.

On appeal, counsel asserts that the district director erred in requiring Mr. Flores Villar to have been physically present in the United States for ten years prior to the applicant's birth, five of which occurred after his 14th birthday. She further contends that the U.S. residence of Mr. Flores Villar's mother should be imputed to her son as he was a minor at the time of the applicant's birth. Counsel also finds the gender-specific residency requirements of the Act to violate the equal protection guarantees embedded in the Fifth Amendment of the U.S. Constitution.

As the applicant was born out of wedlock to parents who never married, the derivative citizenship provisions set forth in section 309 of the Act apply to this case. Prior to November 14, 1986, section 309 of the Act required a father's paternity to be established by legitimation before a child reached twenty-one years

of age. As of that date, the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA) amended section 309, applying the changed provisions to persons who were not yet 18 years of age on November 14, 1986.[2] As the applicant in this case was only 12 years old on November 14, 1986, his application will be considered under section 309(a) of the Act, as established by the 1986 amendments. Section 309(a) of the Act states:

Section 309(a) of the Act states:

> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 . . . shall apply as of the date of birth to a person born out of wedlock if –

---

[2] The Immigration Technical Corrections Act of 1988, Pub L. 100-525, 102 Stat. 2609, states, in pertinent part:

> Section 8. Immigration and Nationality Act Amendments of 1986 (Pub L. 99-653).
>
> . . .
>
> (r) Effective Dates. – INAA is further mended [sic] by adding at the end the following new section:
>
> "Effective Dates
>
> "Sec. 23 . . .
>
> "(d) The amendment made by section 12 shall apply to persons born on or after November 14, 1986.
>
> "(e)
>
> (1) Except as provided in paragraph (2)(B), the new section 309(a) (as defined in paragraph 4(A)) shall apply to persons who have not attained 18 years of age as of the date of the enactment of this Act.

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years –

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

Should the applicant establish his eligibility under section 309(a) of the Act, he must also prove that prior to his birth, his father was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which followed his 14th birthday, as required by section 301(g) of the Act. Honorable service in the U.S. military, employment with the U.S. Government or with certain international organizations

by U.S. citizen parents may qualify as physical presence in the United States.

The AAO now turns to the basis for the district director's denial of the applicant – the failure of the applicant to establish his father's presence in the United States for the requisite period of time prior to his birth. The district director denied the application because the record did not establish that Mr. Flores Villar had been physically present in the United States for a total of ten years, five of which followed his 14th birthday. However, as previously noted, section 301(g) of the Act, as amended in 1986, requires Mr. Espinoza [sic] to have been physically present in the United States for only five years prior to the applicant's birth, two of which followed his 14th birthday.

To establish the length of his father's physical presence in the United States, the applicant has submitted a report of Mr. Flores Villar's social security earnings; a January 23, 1980 oral decision of an immigration judge ordering the removal of Mr. Flores Villar from the United States, which notes that the applicant's father was admitted to the United States at approximately one year of age and spent virtually all of his life in the United States; a 1968-1969 property tax assessment from San Diego County, California issued to Carolina S.F. Villar; a 1966 deed of property in the City of San Diego in the name of Carolina Sandez Flores Villar; Mr. Flores Villar's immigrant visa and alien registration showing his admission to the United States on May 18, 1959; and

September 2006 declarations from Mr. Flores Villar and his mother, Eva Carolina Flores concerning their residence in the United States.

While the AAO notes the above documentation, it does not find the evidence sufficient to establish that Mr. Flores Villar was physically present in the United States for a total of five years prior to the applicant's 1974 birth, two of which followed his 14th birthday. The social security earnings report in the record does not establish Mr. Flores Villar's residence in the United States prior to the applicant's birth. The report shows no income for Mr. Flores Villar for any year prior to 1975, the year after the applicant was born. The statements made by the immigration judge in 1980 proceedings to remove Mr. Flores Villar from the United States also fail to establish that Mr. Flores Villar met the specific physical presence requirements of section 301(g) of the Act. The evidence on which the judge based his comments concerning Mr. Flores Villar's lengthy U.S. residence is not found in the record and the judge's general statement that Mr. Flores Villar had lived in the United States "for all of his life practically," does not establish the specific time periods during which he was physically present in the United States.

The AAO has considered the 1968-1969 property tax assessment and 1966 property deed in the record, but notes that both documents are issued in the name of Mr. Flores Villar's mother. Although the AAO acknowledges that Mr. Flores Villar's September 21, 2006 declaration states that he lived with his mother

during the 1960s, no evidence, e.g., school, medical, church, tax or census records, has been submitted to support his claim. Accordingly, the assessment and deed establish [sic] do not demonstrate that Mr. Flores Villar was living in San Diego in the 1960s.

Mr. Flores Villar's declaration indicates that he entered the United States as an immigrant in 1959 and that, thereafter, he lived with his mother. He states that from 1963 until 1965, he lived at [Address Omitted] in San Diego and then in 1965 moved to [Address Omitted], San Diego where he grew up, attending Chollas Elementary School. His mother's September 22, 2006 declaration reports that she, her husband and her children, including Mr. Flores Villar, lived in Los Angeles from 1959-1961 before moving back to Mexico. In 1963, Ms. Flores Villar states, she moved back to the United States, purchasing a home in San Diego in 1965. She asserts that her son lived primarily with her beginning in 1963, although he would see his father in Tijuana. The AAO will not, however, accept these declarations as proof of Mr. Flores Villar's presence in the United States prior to the applicant's birth. In the absence of any type of documentary evidence, the declarations of Mr. Flores Villar and his mother are insufficient proof of his U.S. residence. Going on record without documentary evidence will not satisfy the applicant's burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel on appeal also contends that section 301(g) of the Act should be construed to impute the residence of a U.S. citizen grandparent, Ms. Flores Villar, to a U.S. citizen father who had a child out of wedlock while still a minor, Mr. Flores Villar. She cites the findings of *Cuevas-Gasper v. Gonzalez*, 430 F.3d 1013 (9th Cir. 2005) and *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994) as offering proof of the way in which the courts have dealt with residence under other titles of the Act. Counsel's reasoning is not, however, persuasive. The referenced cases relate to removal proceedings, specifically the imputation of parents' *lawful permanent residence/lawful unrelinquished domicile* in cases involving cancellation of removal and discretionary waiver of deportation. Accordingly, neither the facts of these cases, nor their findings are relevant to the current matter before the AAO – whether the record establishes that the applicant's father has met the *physical presence* requirements of section 301(g) of the Act.

Counsel also contends that the physical presence requirement imposed on the U.S. citizen fathers of children born out of wedlock violates the equal protection guarantees embedded in the Fifth Amendment by discriminating along both age and gender lines. The AAO, like the Board of Immigration Appeals, cannot rule on the constitutionality of laws enacted by the U.S. Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Accordingly, the AAO will not

consider counsel's assertions regarding the constitutionality of the residency requirements of section 301(g) of the Act.

Based on the evidence of record, the applicant has not established that his father, Mr. Flores Villar, was physically present in the United States for five years prior to his birth, two of which followed his father's 14th birthday. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the AAO also finds the evidence in the record to be insufficient to establish that Mr. Flores Villar supported the applicant financially until he reached 18 years of age, as required by section 309(a)(3) of the Act. Mr. Flores Villar's declaration indicates that the applicant "grew up with [her] and [her] children" and that the applicant is like a son to her. Mr. Flores Villar's declaration states that the applicant came to live with him at his mother's house following his December 1974 hospitalization. He does not address whether he was financially responsible for the applicant during his childhood. Neither is there any evidence in the record that Mr. Flores Villar supported his son financially until he reached 18 years of age. In the absence of such evidence, the applicant has also failed to establish his eligibility for a certificate of citizenship under section 309(a) of the Act. For this reason as well, the appeal will be dismissed.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish

the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in this proceeding.

ORDER: The appeal is dismissed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Case No. 06cr0592-BTM
Plaintiff,	
vs.	San Diego, California
RUBEN FLORES-VILLAR,	March 29, 3007 [sic]
Defendant.	

BEFORE THE
HONORABLE BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Christopher McFadden
Assistant U.S. Attorney
80 Front Street
San Diego, CA 92102

For the Defendant: Elizabeth M. Barros
Federal Defenders
225 Broadway, Suite 900
San Diego, CA 92101

* * *

[208] MS. BARROS: Your Honor, I haven't had an opportunity to discuss this with Mr. Flores-Villar yet as to what his preference would be, but we do have our witnesses ready.

THE COURT: Well, that was another thing, because we are paying for those witnesses, and I don't want to waste –

MS. BARROS: Right. The father has a ticket. His flight comes in Monday morning, and if we were to continue it I'm sure we could reschedule that flight at some point. But as it stands right now he is planning on being here on Monday.

THE COURT: Well, I mean, my question is what do I instruct the jury? What I instruct the jury is – how do I rule on the motion in limine because if I rule one way I may not have to instruct the jury.

* * *

[218] MS. BARROS: Actually, your Honor, I submitted proposed jury instructions. I filed them earlier today. And my proposed instruction on this basically reads, "A person born in the United States is a United States citizen. A person born outside of the United States is a United States citizen if, 1, one of their parents is a United States citizen; and two, the citizen parent was physically present in the United States for a continuous period of one year at some point prior to the birth." That is based on the equal protection argument, the one year requirement.

"And, 3 if the person was born out of wedlock to a citizen father, an alien mother, and the father legitimized the child prior to the child reaching the age of 21."

* * *

[225] THE COURT: So, look, I can't sit here and tell you I can walk through all these statutes. They always confuse me because they talk in the statute about – they will talk about the section of the amendment, et cetera, and I have to chart this out and figure it out. I thought I had it under control until you gave me this.

MR. MCFADDEN: I think we did, too.

THE COURT: Until two o'clock I was under control on this.

MS. BARROS: I think the easy way really to resolve this is to agree with me on my equal protection argument and instruct the jury that it's one year.

THE COURT: Well, I can't do things just because it's the easy way.

MS. BARROS: Well, I think it's also the right way to go.

THE COURT: Let's put that issue aside for the moment, and deal with this issue.

* * *

[260] THE COURT: Well, if that's the case, and the government does not dispute that, then the old 309 would apply, but, I mean, I can't tell until the government makes a commitment on that, and I'm not going to ask them to do that today.

So really I'm going to talk about, my opinion is going to talk about, which 301 applies. That's the question. Because if one version of 301 applies, then the evidence doesn't come in, it's not relevant, because no rational juror could find derivative citizenship.

If the other version, if the new version of 301 applies, then that's a question for the jury. The Citizenship and Immigration Services didn't think he qualified, but that's not for them – that is for them to decide in that context but not in a criminal context. So you are free to argue that before the jury with different evidence, the same evidence, or otherwise. And so –

MS. BARROS: I guess our position, I would just like to note that if the court does decide that the ten and the five-year requirement applies, I think that actually strengthens our equal protection argument because it then makes it physically impossible for someone in – someone like Mr. Flores's father to transmit citizenship to his son, whereas a woman in the same position would be physically able

* * *

U.S. District Court
Southern District of California

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Room 3000
Washington, DC 20529

[SEAL] **U.S. Citizenship and Immigration Services**

RUBEN FLORES-VILLAR
808 UNION STEET [sic]
San Diego, CA 92101

File: A92 414 360 Office: SAN DIEGO, CA

Date: APR 02 2007

IN RE: Applicant: RUBEN FLORES-VILLAR

APPLICATION: Application for Certificate of Citizenship under Sections 309(a) and 301(g) of the Immigration and Nationality Act; as amended, U.S.C. §§ 1409(a) and 1401(g)

ON BEHALF OF APPLICANT:

ELIZABETH M. BARROS
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, SUITE 900
SAN DIEGO, CA 92101

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned

to the office that originally decided your case. Any further inquiry must be made to that office.

/s/ Ellen L. Johnson
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Diego, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed on March 29, 2007. Based on a misapplication of the physical presence requirements of section 301(g) of the Immigration and Nationality Act (the Act), the AAO reopens the matter for further consideration. – The appeal will be dismissed.

The record reflects that the applicant was born on October 7, 1974 in Mexico.[1] The individual identified as the applicant's natural father, Ruben Trinidad Flores Villar Sanchez (Mr. Flores Villar), automatically acquired U.S. citizenship at birth on

---

[1] The record contains a birth certificate and registration that list the applicant's date of birth as October 7, 1975. Although counsel at the time of filing indicated that she was submitting an amended birth certificate to establish the applicant's birth as having occurred on October 7, 1974, that documentation also shows the applicant's date of birth as October 7, 1975. The AAO notes, however, that the applicant's baptismal certificate lists an October 7, 1974 date of birth and that other documentation in the record indicates that the applicant was admitted to San Diego University Hospital in December 1974 as a two-month old premature baby. Accordingly, the AAO will accept counsel's claim that the applicant was born on October 7, 1974.

December 25, 1957 through his U.S. citizen mother, Eva Carolina Flores Villar (Ms. Flores Villar). The applicant's mother, Mercedes Negrete Vazquez was identified as a Mexican citizen at the time of his birth and the record does not indicate that her nationality has changed. The applicant's parents never married. The applicant seeks a certificate of citizenship pursuant to sections 309 and 301(g) of the Act, as amended, 8 U.S.C. §§ 1409 and 1401(g), based on the claim that he acquired U.S. citizenship at birth through his natural father.

Based on the evidence of record, the district director determined that the applicant had not established that his father, prior to his birth, had been physically present in the United States for at least ten years, five of which followed his 14th birthday, as required by section 301(a)(7) of the Act. Accordingly, he denied the application.

On appeal, counsel asserts that the district director erred in requiring Mr. Flores Villar to have been physically present in the United States for ten years prior to the applicant's birth, five of which occurred after his 14th birthday. She further contends that the U.S. residence of Mr. Flores Villar's mother should be imputed to her son as he was a minor at the time of the applicant's birth. Counsel also finds the gender-specific residency requirements of the Act to violate the equal protection guarantees embedded in the Fifth Amendment of the U.S. Constitution.

As the applicant was born out of wedlock to parents who never married, the derivative citizenship provisions set forth in section 309 of the Act apply to this case. Prior to November 14, 1986, section 309 of the Act required a father's paternity to be established by legitimation before a child reached twenty-one years of age. As of that date, the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (INAA) amended section 309, applying the changed provisions to persons who were not yet 18 years of age on November 14, 1986.[2] As the applicant in this case was only 12 years old on November 14, 1986, his application will be considered under section 309(a) of the Act, as established by the 1986 amendments.

---

[2] The Immigration Technical Corrections Act of 1988, Pub L. 100-525, 102 Stat. 2609. states, in pertinent part:

> Section 8. Immigration and Nationality Act Amendments of 1986 (Pub L. 99-653).
>
> . . .
>
> (r) Effective Dates. – INAA is further mended [sic] by adding at the end the following new section:
>
> "Effective Dates
>
> "Sec.23.
>
> "(d) The amendment made by section 12 shall apply to persons born on or after November 14, 1986.
>
> "(e)
>
> (1) Except as provided in paragraph (2)(B), the new section 309(a) (as defined in paragraph 4(A)) shall apply to persons who have not attained 18.years of age as of the date of the enactment of this Act.

Section 309(a) of the Act states:

> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 . . . shall apply as of the date of birth to a person born out of wedlock if –
>
> > (1) a blood relationship between the person and the father is established by clear and convincing evidence,
> >
> > (2) the father had the nationality of the United States at the time of the person's birth,
> >
> > (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
> >
> > (4) while the person is under the age of 18 years –
> >
> > > (A) the person is legitimated under the law of the person's residence or domicile,
> > >
> > > (B) the father acknowledges paternity of the person in writing under oath, or
> > >
> > > (C) the paternity of the person is established by adjudication of a competent court.

If the applicant establishes his eligibility under section 309(a) of the Act, he must also prove that prior to his birth, his father has met the physical

presence requirements of section 301(g) of the Act. Honorable service in the U.S. military, employment with the U.S. Government or with certain international organizations by U.S. citizen parents may qualify as physical presence in the United States.

The AAO now turns to the basis for the district director's denial of the applicant – the failure of the applicant to establish his father's presence in the United States for the requisite period of time prior to his birth. The district director denied the application because Mr. Flores Villar, prior to the applicant's birth, had not been physically present in the United States for a total of ten years, five of which followed his 14th birthday, the physical presence requirements of section 301(g) of the Act prior to amendment by the INAA. On appeal, counsel contends that Mr. Espinoza [sic] need have been physically present in the United States for only five years prior to the applicant's birth, two of which followed his 14th birthday, the amended requirements of section 301(g). The AAO notes, however, that while the 1986 amendments to section 309(a) may be applied to individuals who were not yet 18 years of age on the date of that legislation's enactment, the amended language of section 301(g) may be applied only to persons born on or after November 14, 1986.[3] Accordingly, the applicant in the

---

[3] As indicated in Footnote 2, section 23(d) of the Immigration Technical Corrections Act of 1988 states that the amendment made by section 12 of the INAA of 1986, i.e., the amendment to section 301(g) of the Act, applies only to persons

(Continued on following page)

present case must establish eligibility under section 301(g) of the Act by proving that his father resided in the United States for ten years prior to his birth, five of which followed Mr. Espinoza's [sic] 14th birthday.

Although the applicant, has submitted evidence to establish the length of his father's physical presence in the United States, the AAO notes that the applicant was born several months before his father celebrated his 17th birthday. As the applicant's birth occurred only three years after Mr. Espinoza's [sic] 14th birthday, it is not possible for the applicant to establish that his father met the residency requirements of section 301(g) of the Act prior to his birth – a total of ten years of physical presence, five of which followed his father's 14th birthday.

Counsel on appeal also contends that section 301(g) of the Act should be construed to impute the residence of a U.S. citizen grandparent, Ms. Flores Villar, to a U.S. citizen father who had a child out of wedlock while still a minor, Mr. Flores Villar. She cites the findings of *Cuevas-Gasper v. Gonzalez*, 430 F.3d 1013 (9th Cir. 2005) and *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994) as offering proof of the way in which the courts have dealt with residence under other titles of the Act. Counsel's reasoning is not, however,

---

born on or after November 14, 1986. In its initial dismissal of the application, the AAO failed to distinguish between the effective date language of section 23(e)(1) of the Immigration Technical Corrections Act of 1988 and that of section 23(d).

persuasive. The referenced cases relate to removal proceedings, specifically the imputation of parents' *lawful permanent residence/lawful unrelinquished domicile* in cases involving cancellation of removal and discretionary waiver of deportation. Accordingly, neither the facts of these cases, nor their findings are relevant to the current matter before the AAO – whether the record establishes that the applicant's father has met the *physical presence* requirements of section 301(g) of the Act.

Counsel also contends that the physical presence requirement imposed on the U.S. citizen fathers of children born out of wedlock violates the equal protection guarantees embedded in the Fifth Amendment by discriminating along both age and gender lines. The AAO, like the Board of Immigration Appeals, cannot rule on the constitutionality of laws enacted by the U.S. Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Accordingly, the AAO will not consider counsel's assertions regarding the constitutionality of the residency requirements of section 301(g) of the Act.

Based on the evidence of record, the applicant has not established that his father, Mr. Flores Villar, was physically present in the United States for ten years prior to his birth, five of which followed his father's 14th birthday. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the AAO also finds the evidence in the record to be insufficient to establish that Mr. Flores Villar supported the applicant financially until he reaches 18 years or age, as required by section 309(a)(3) of the Act. Mr. Flores Villar's declaration indicates that the applicant "grew up with [her] and [her] children" and that the applicant is like a son to her. Mr. Flores Villar's declaration states that the applicant came to live with him at his mother's house following his December 1974 hospitalization. He does not address whether he was financially responsible for the applicant during his childhood. Neither is there any evidence in the record that Mr. Flores Villar supported his son financially until he reached 18 years of age. In the absence of such evidence, the applicant has also failed to establish his eligibility for a certificate of citizenship under section 309(a) of the Act. For this reason as well, the appeal will be dismissed.

The regulation at 8 C.F.R. § 341.2(c) states that the burden of proof shall be on the applicant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met his burden in this proceeding.

ORDER: The appeal is dismissed.

497 F.Supp.2d 1160

United States District Court,
S.D. California.
UNITED STATES of America, Plaintiff,
v.
Ruben FLORES-VILLAR, Defendant.
No. 06cr0592 BTM.

May 16, 2007.

ORDER GRANTING MOTION IN LIMINE TO PRECLUDE EVIDENCE RE: DERIVATIVE CITIZENSHIP

MOSKOWITZ, District Judge.

The United States has filed a motion in limine to preclude evidence regarding Defendant's claim of derivative citizenship through his U.S. citizen father. For the reasons discussed below, the United States' motion is **GRANTED.**

I. *BACKGROUND*

Ruben Flores-Villar ("Defendant") was born on October 7, 1974 in Tijuana, Mexico. His biological mother, Maria Mercedes Negrete, is a citizen and national of Mexico. His biological father, Ruben Trinidad Floresvillar-Sandez ("Floresvillar"), was sixteen-years old when Defendant was born. A Certificate of Citizenship was issued to Floresvillar in 1989 based on the fact that his mother, Eva Carolina Sandez-Machado ("Sandez"), is a United States citizen.

Shortly after Defendant was born, he came to the United States to receive medical treatment. (Floresvillar Decl. (Def.'s Exh. C) ¶ 9.) After he was released from the hospital, he came to live with Floresvillar and Sandez in San Diego. (*Id.*) Defendant grew up with Floresvillar, Sandez, and Floresvillar's siblings in San Diego and Chula Vista. (Floresvillar Decl. ¶ 10.) Defendant had little contact with his biological mother who continued to live in Mexico. (*Id.* at ¶ 11.) In 1985, Floresvillar filed an acknowledgment of paternity with the civil registry in Tijuana. (Def.'s Exh. P.) Floresvillar claimed Defendant as a dependent and identified him as his son on his tax returns for years 1983, 1989, 1990, and 1991. (Def.'s Exh. S.)

Recently, Defendant applied for a Certificate of Citizenship under Sections 309(a) and 301(g) of the INA. The District Director denied the application on the ground that Defendant could not establish that his father, prior to his birth, had been physically present in the United States for at least ten years, five of which followed his fourteenth birthday, as required by former section 301(a)(7) of the INA. Defendant appealed the District Director's decision.

In a decision dated March 29, 2007, the Administrative Appeals Office ("AAO") dismissed the appeal. The AAO held that section 301(g) of the INA, as amended in 1986, required that Defendant's father have been physically present in the United States for only five years prior to the applicant's birth, two of which followed his fourteenth birthday. However, the

AAO held that the evidence of record was not sufficient to establish that his father had met the physical presence requirement. In addition, the AAO held that the evidence in the record was insufficient to establish that Defendant's father agreed to support Defendant financially until he reached the age of eighteen, as required by section 309(a)(3) of the INA (added in 1986).

In a decision dated April 2, 2007, the AAO determined that it had misapplied the physical presence requirements of section 301(g) and reopened the matter for further consideration. The AAO held that, contrary to its prior decision, the applicable physical presence requirement was ten years, five of which followed his father's fourteenth birthday. The AAO explained that in its initial decision, the AAO failed to distinguish between section 23(d) of the Immigration Technical Corrections Act of 1988 (which provided that the 1986 amendment to section 301(g) of the Act applies to persons born on or after November 14, 1986) and section 23(e) (which governs when the 1986 amendments to section 309(a) apply). The AAO concluded that because Defendant's father was only sixteen at the time Defendant was born, he could not meet the applicable residency requirements.

II. *DISCUSSION*

The Government seeks the exclusion of evidence regarding Defendant's derivative citizenship claim on

the ground that he cannot satisfy the transmission-of-citizenship requirements of INA §§ 309(a) and 301(g), 8 U.S.C. §§ 1409(a) and 1401(g). The Court agrees that even viewing the evidence in the light most favorable Defendant, no reasonable juror could find that Defendant could establish derivative citizenship through his citizen father. Therefore, any evidence of Defendant's father's citizenship, residency, or legitimating acts is not relevant.

A. *Residence Requirement*

When Defendant was born, the applicable law provided that a person shall be a national and a citizen of the United States at birth who is:

> born outside of the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States, who, *prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.*

INA § 301(a)(7), 8 U.S.C. § 1401(a)(7) (later redesignated as INA § 301(g), 8 U.S.C. § 1401(g)). (Emphasis added.)

Pursuant to INA § 309(a), section 301(a)(7) was made applicable to children born out of wedlock to U.S. citizen fathers "if the paternity of such child is

established while such child is under the age of twenty-one by legitimation." Legitimation could occur under the law of the child's residence or domicile or under the law of the father's residence or domicile. 8 U.S.C. § 1101(b)(1)(C).

In 1986, section 301(g) was amended, and the physical presence requirement was changed to "five years, at least two of which were after attaining the age of fourteen years." Immigration and Nationality Act Amendments of 1986, Pub.L. 99-653, 100 Stat. 3655, § 12. The 1986 amendments also amended section 309(a), adding additional requirements for the transmission of citizenship to a child born out of wedlock.[1] *Id.* at § 13.

The Immigration Technical Corrections Act of 1988 ("ITCA") clarified that "[t]he amendment made

---

[1] As amended, section 309(a) provided:

> The provisions of paragraphs (c),(d), (e), and (g) of section 301 . . . shall apply as of the date of birth to a person born out of wedlock if a blood relationship between the person and the father is established by clear and convincing evidence, provided the father had the nationality of the United States at the time of the person's birth, the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of eighteen years and if, while such child is under the age of eighteen years, (1) such child is legitimated under the law of the child's residence or domicile, or (2) the father acknowledges paternity of the child in writing under oath, or (3) paternity of the child is established by adjudication of a competent court.

by section 12 [of the 1986 Act] shall apply to persons born on or after November 14, 1986." Pub.L. 100-525, 102 Stat. 2609, § 23(d). The ITCA also provided that the new section 309(a) "shall apply to persons who have not attained 18 years of age as of the date of the enactment of this Act," and that the old section 309(a) shall apply to "any individual who has attained 18 years of age as of the date of the enactment of this Act," and "any individual with respect to whom paternity was established by legitimation before such date." *Id.* at § 23(e).

To determine which physical presence requirements apply here, the Court looks to section 23(d) of the ITCA, which provides that the new physical presence requirements apply to persons *born on or after November 14, 1986.* Because Defendant was born before November 14, 1986, he must show that prior to his birth, his father was physically present in the United States for not less than ten years, at least five of which were after attaining the age of fourteen years.

In light of the fact that Floresvillar was sixteen when Defendant was born, he could not have satisfied the requirement of physical presence in the United States for five years after attaining the age of fourteen years. Therefore, Floresvillar did not transmit U.S. citizenship to Defendant.

Defendant contends that the ITCA is unconstitutional because it operates retroactively to deprive people like Defendant of their vested right to

citizenship.[2] However, the 1988 law only clarified the effect of the 1986 amendment and did not make the 1986 amendment inapplicable where it was otherwise applicable or vice versa. It has long been established that *the law in effect at the time of the child's birth* is to be applied in determining transmission of citizenship from a U.S. citizen parent. *See, e.g., Rodriguez-Romero v. INS,* 434 F.2d 1022 (9th Cir.1970) (per curiam), *cert. denied,* 401 U.S. 976, 91 S.Ct. 1199, 28 L.Ed.2d 326 (1971); *Ablang v. Reno,* 52 F.3d 801, 803 (9th Cir.1995) ("The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. Citizen is the statute that was in effect at the time of the child's birth.") (quoting *Runnett v. Shultz,* 901 F.2d 782, 783 (9th Cir.1990)). Thus, the shortened residency requirements were never applicable to Defendant, and the 1988 law did not retroactively deprive Defendant of a vested right to citizenship.

Relying on *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir.2005), Defendant makes the alternate argument that his paternal grandmother's residency should be imputed to his father, who was a minor at the time of Defendant's birth. However, *Cuevas-Gaspar* is inapposite. In *Cuevas-Gaspar,* the issue was whether a parent's *permanent residence status* could be imputed to an unemancipated minor child for purposes of satisfying the cancellation of removal

---

[2] According to Defendant, prior to the enactment of ITCA, his father had satisfied the shortened residency requirement as well as the other requirements for transmission of citizenship.

requirement that the alien had resided in the United States continuously for seven years "after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). Here, the relevant requirement is that the father have resided in the United States for at least five years *after the age of fourteen*. Therefore, what Defendant asks us to do is either impute the grandmother's age at the time of Defendant's birth to Defendant's father or impute the fact that at the time Defendant was born the grandmother had resided in the United States for more than five years after *she* turned fourteen. Neither of these options is supported by the language of the statute or caselaw.

The residency requirement of section 301(g) is objective and straightforward. The Ninth Circuit has refused to apply the theory of constructive residence to transmission of citizenship cases, *see Runnett v. Shultz*, 901 F.2d 782 (9th Cir.1990), and has never held that imputation of any kind would be proper in the context of transmission of citizenship. As provided in 8 U.S.C. § 1421(d), "A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." Although citizenship under section 309(a) is retroactive to the date of birth, it is a naturalization under 8 U.S.C. § 1421(d). *Nguyen v. INS*, 533 U.S. 53, 72, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001). The language of § 301(g) is clear and does not provide for imputation. Accordingly, Defendant's grandmother's physical presence in the

United States and/or age cannot be imputed to Defendant's father.

B. *Equal Protection*

Defendant argues that the residency requirements set forth in section 301(g) (formerly section 301(a)(7)) violate the Equal Protection Clause because they discriminate on the basis of gender as well as age.

1. *Gender Discrimination*

A child born after December 23, 1952, outside of the United States to an unmarried U.S. citizen mother acquires U.S. citizenship at birth if the mother had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. § 1409(c). Defendant argues that the different residency requirement for unmarried men is not substantially related to an important governmental interest.

It is unclear whether a lesser degree of scrutiny applies to gender-based classifications in the immigration context. *See Nguyen v. INS*, 533 U.S. 53, 61, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001). However, section 301(g) survives scrutiny under either the intermediate scrutiny standard or the rational basis standard.

The Government points out that legislative history suggests that Congress was concerned with

harmonizing United States law with the laws of foreign countries. In 1938, President Roosevelt submitted to Congress a report proposing a revision and codification of the nationality laws of the United States. *Nationality Laws of the United States: Message from the President of the United States,* 76th Cong., 1st Sess., Pt. 1, at V (House Comm. On Immigration and Naturalization 1939) ("Proposed Code"). Section 204 of the Proposed Code provided that in the absence of legitimation, a child born out of wedlock in a foreign country shall be held to have acquired at birth the nationality of his or her United States citizen mother. Comments to this section noted: "It may be observed finally that the laws of some thirty foreign countries contain provisions for the nationality of illegitimate children, in the absence of acknowledgment or legitimation, and in all but Turkey such children follow the mother's nationality in the absence of any act legally establishing filiation."

A senate report regarding the revision of immigration and nationality laws specifically stated: "This provision [section 309] establishing the child's nationality as that of the mother regardless of legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth." S.Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952).[3] In other words, Congress eased restrictions

---

[3] That Congress was concerned about the potential for statelessness is substantiated by the fact that the physical

(Continued on following page)

on the transfer of U.S. citizenship from an unmarried U.S. citizen mother to her child born in a foreign country to address situations where the child would otherwise fail to qualify as a U.S. citizen (due to the mother's failure to meet the substantial physical presence requirement), and the foreign country would refuse to recognize the child as one of its citizens, deeming the child to have acquired the nationality of his mother.

There is a need for "special judicial deference to congressional policy choices in the immigration context." *Fiallo v. Bell*, 430 U.S. 787, 793, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). Given what appear to be bona fide reasons for applying different physical presence requirements to unwed U.S. citizen mothers and U.S. citizen fathers, the Court rejects Defendant's Equal Protection argument.

2. *Age Discrimination*

In addition to arguing gender discrimination, Defendant argues that he was discriminated against on the basis of age – i.e., the physical presence requirement discriminates against unwed U.S. citizen

---

presence requirement applicable to unwed U.S. citizen fathers is the same as the physical presence requirement for a citizen father *or citizen mother* who has a child outside of the United States while married to a citizen of another country. 8 U.S.C. § 1401(g). An exception was carved out for unwed U.S. citizen mothers only.

fathers under the age of 19. This argument lacks merit.

The government has an important interest in fostering ties between the foreign-born child and the United States. *Nguyen v. INS*, 533 U.S. at 69, 121 S.Ct. 2053; *Miller v. Albright*, 523 U.S. 420, 438, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (Stevens, J.). The requirement that the U.S. citizen father had been physically present in the United States for 10 years, at least five of which were past the age of fourteen, furthers this objective by ensuring that the father developed significant ties with the country at an age of maturity. Therefore, the requirement is rationally related to a legitimate governmental interest.

III. *CONCLUSION*

Because Defendant's father cannot satisfy the physical presence requirement of section 301(g), no reasonable juror could find that Defendant could establish derivative citizenship through his father. Accordingly, evidence of Defendant's father's citizenship, residency, or legitimating acts is not relevant, and the Government's motion exclude such evidence is **GRANTED.** The parties shall appear before the Court for further proceedings on **May 21, 2007 at 9:00 a.m.**

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA Plaintiff v. RUBEN FLORES-VILLAR, Defendant.	Case No. 06CR0592-BTM STIPULATIONS Date: June 12, 2007 Time: 9:00 a.m. Court: Honorable Barry Ted Moskowitz

THE PARTIES HAVING AGREED, IT IS HEREBY STIPULATED between the Plaintiff, UNITED STATES OF AMERICA, through its counsel, Karen P. Hewitt, United States Attorney, and William A. Hall, Jr., Assistant U.S. Attorney, and Defendant, RUBEN FLORES-VILLAR, with the advice and consent of Elizabeth M. Barros, Federal Defenders of San Diego, Inc., counsel for Defendant, that:

I. The following is the uncontroverted testimony of the Government's witnesses:

A. United States Border Patrol Agent Marco Perez, A-file custodian, would testify that:

1. Based on his review of the Defendant's A-file:

A. Defendant appeared before United States Immigration Judge Zsa Zsa

DePaolo at a hearing on March 28, 2005.

B. Defendant stated at that hearing that he was born in Mexico.

C. Upon the conclusion of that hearing, Immigration Judge DePaolo ordered that Defendant be deported to Mexico.

D. Agent Perez would identify Government Exhibit 1 as a duplicate of Immigration Judge DePaolo's written Order deporting Defendant, dated March 28, 2005.

E. Agent Perez would identify Government Exhibit 2 as a duplicate of the Warrant of Deportation prepared to effectuate the deportation of Defendant ordered by immigration Judge DePaolo, dated March 28, 2005.

2. Based on all available computerized and paper record checks Agent Perez performed using Defendant's name, known aliases, and A-file number, A92-414-360, Agent Perez discovered no evidence that Defendant had been granted permission to reenter the United States following his removal.

C. Fingerprint expert David Beers would testify that the fingerprints found on each of the documents contained in Defendant's A-file,

A92-414-360, including a Warrant of Deportation dated March 28, 2005, pertain to Defendant. Mr. Beers would identify a duplicate of this Warrant of Deportation as Government Exhibit 2.

D. Immigration Enforcement Agent Arnold Parise would testify that on March 28, 2005:

1. Agent Parise personally witnessed Defendant's physical removal from the United States to Mexico through the San Ysidro Port of Entry.

2. Agent Parise executed a Warrant of Deportation dated March 28, 2005 that contained Defendant's fingerprint and photograph.

3. Agent Parise would identify a duplicate of this Warrant of Deportation as Government Exhibit 2.

E. United States Border Patrol Agent Damian Carraway would testify that on February 24, 2006:

1. Defendant was arrested approximately fifteen miles north of the international border, within the Southern District of California; specifically, in the 3700 block of Market Street in San Diego, California.

2. Defendant did not appear to have, and did not claim to have, been forced across the international border.

F. United States Border Patrol Agent Brian DeRosiers would testify that on February 24, 2006:

1. Defendant waived his *Miranda* rights.

2. Defendant stated that he was born in Tijuana, Mexico.

3. Defendant stated that he had previously been deported by an Immigration Judge and removed to Mexico.

4. Defendant stated that he did not apply for permission to re-enter the United States legally after being deported.

5. Defendant stated that he crossed from Mexico into the United States by walking across the international border, east of Otay Mesa, California on October 7, 2005.

II. At a hearing on March 2, 2007, the Court previously found that the statements in section I(F) of this stipulation, set forth immediately above, were voluntarily made.

III. The following statements, contained within certified court transcripts, are hereby admitted into evidence:

A. On June 16, 2003, defendant stated under oath and penalty of perjury that he is not a U.S. citizen.

B. On October 30, 2003, defendant stated that he was in [sic] born in Mexico.

C. On March 28, 2005, defendant stated that he was in [sic] born in Mexico.

IV. The following Government Exhibits are admissible into evidence:

A. Government Exhibit Immigration Judge Order (duplicate), dated March 28, 2005

B. Government Exhibit 2: Warrant of Deportation (duplicate), dated March 28, 2005

SO STIPULATED.

DATED: 6-11-07 /s/ EBarros
ELIZABETH M. BARROS
Federal Defenders of
San Diego, Inc.
Attorneys for Mr. Flores Villar

DATED: 6-11-07 /s/ Ruben Flores
RUBEN FLORES VILLAR

DATED: 6/12/07 /s/ William Hall
WILLIAM A. HALL, JR.
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, v. RUBEN FLORES-VILLAR, DEFENDANT.	CASE NO. 06-CR-00592-BTM MOTION HEARING BENCH TRIAL JUNE 12, 2007

BEFORE THE
HONORABLE BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE

* * *

[15] DEFENDANT FLORES-VILLAR: YES.

THE COURT: NOW, HAS ANYONE THREATENED YOU OR COERCED YOU OR PRESSURED YOU OR ANY MEMBERS OF YOUR FAMILY TO GET YOU TO GIVE UP YOUR RIGHT TO A TRIAL BY JURY AND THE RIGHTS THAT GO ALONG WITH IT?

DEFENDANT FLORES-VILLAR: NO.

THE COURT: HAS ANYBODY MADE ANY PROMISES, REPRESENTATIONS, INDUCEMENTS OF ANY KIND THAT YOU'RE RELYING ON TO ADMIT THE – WELL, LET ME BACK UP. I MIS-STATED THAT.

HAS ANYONE MADE ANY PROMISES, REPRESENTATIONS, OR INDUCEMENTS OF ANY KIND THAT YOU'RE RELYING ON TO WAIVE YOUR RIGHT TO TRIAL BY JURY AND AGREE TO THE TRIAL PROCEDURE THAT'S BEEN MENTIONED HERE?

DEFENDANT FLORES-VILLAR: NO.

MS. BARROS: YOUR HONOR, THE – YES. THE GOVERNMENT HAS AGREED TO RECOMMEND A DEPARTURE. FOR ACCEPTANCE OF RESPONSIBILITY IF HE'S FOUND GUILTY, YOUR HONOR.

MR. HALL: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND THAT WAS A "YES"?

MR. HALL: YES.

THE COURT: OKAY. AND ANYTHING ELSE?

[16] MR. HALL: NO, YOUR HONOR.

MS. BARROS: HIS DECISION WAS ALSO BASED ON THE COURT'S PRETRIAL RULINGS TO EXCLUDE TWO DEFENSES AT TRIAL.

THE COURT: WELL, MY UNDERSTANDING IS THAT HE WOULD HAVE THE RIGHT TO APPEAL THOSE RULINGS, AND IF THE COURT OF APPEALS DISAGREES WITH ME, THEN HIS CONVICTION WOULD BE REVERSED, AND IT

WOULD COME BACK HERE AND FOR A TRIAL, AT WHICH TIME HE WOULD THEN HAVE THE RIGHT TO HAVE A TRIAL BY JURY. HIS WAIVER WOULD NO LONGER BE IN EFFECT. ON THE OTHER HAND, IF THE COURT OF APPEALS DID HAVE – IF IT AGREES WITH ME, THEN HE COULD NOT PREVAIL ON THAT ISSUE. AND UNLESS THERE WAS SOME OTHER ISSUE HE PREVAILED UPON, HIS CONVICTION AND SENTENCE WOULD REMAIN IN EFFECT –

MS. BARROS: YOUR HONOR, THAT PRESUMES –

THE COURT: – IF THE COURT – IF THE COURT FINDS HIM GUILTY BASED UPON THE PROCEEDINGS.

MR. BARROS: – CORRECT. THAT IS HIS UNDERSTANDING, YOUR HONOR.

THE COURT: OKAY. SO HE – BY THIS PROCEEDING AND PROCEDURE, HE STILL PRESERVES ALL THE RIGHTS TO APPEAL, JUST AS IF IT HAD BEEN A JURY TRIAL AND HE WERE FOUND GUILTY AFTER A [17] JURY TRIAL, AND THAT'S ASSUMING THAT THE COURT FINDS HIM GUILTY. AND THE COURT HASN'T LISTENED TO THE FACTS, AND HE'S PRESUMED TO BE INNOCENT; SO IF, AFTER LISTENING TO THE STIPULATED FACTS AND EXHIBITS, THE COURT FINDS THAT IT HASN'T BEEN PROVED BEYOND A REASONABLE DOUBT THAT HE'S GUILTY, THEN THAT'S THE END OF THE CASE.

MS. BARROS: YES.

THE COURT: OKAY?

DO YOU UNDERSTAND ALL THIS?

DEFENDANT FLORES-VILLAR: YES.

THE COURT: OKAY. DO YOU HAVE ANY QUESTIONS FOR ME ABOUT IT?

DEFENDANT FLORES-VILLAR: NO.

* * *

[24] MS. BARROS: AND, YOUR HONOR, YOU PREVIOUSLY ASKED IF WE WISHED TO PRESENT ANY EVIDENCE. AS THE COURT KNOWS, WE WISHED TO PRESENT EVIDENCE, BUT THE COURT HAS PRECLUDED THAT, [25] AND -

THE COURT: RIGHT. YOU WISH TO PRESENT EVIDENCE AS TO HIM BEING A DERIVATIVE CITIZEN BASED UPON HIS FATHER BEING A U.S. CITIZEN WHEN HE WAS BORN.

MS. BARROS: THAT AND THAT HE BELIEVED HE WAS A U.S. CITIZEN.

THE COURT: AND THAT HE BELIEVED HE WAS A U.S. CITIZEN. I HAVE ISSUED A WRITTEN OPINION ON THAT, ASSUMING THE FACTS. AS STATED BY YOU, THAT YOU WISHED TO OFFER, THAT AS A MATTER OF LAW, NO JUROR COULD FIND THAT THAT WOULD CREATE DERIVATIVE – A REASONABLE DOUBT AS

TO DERIVATIVE CITIZENSHIP; THEREFORE, I WASN'T GOING TO ALLOW THAT, AND I RULED THAT THAT WOULD NOT COME INTO EVIDENCE. AND HIS BELIEF THAT HE WAS A U.S. CITIZEN WOULD NOT BE RELEVANT IN THE FOUND-IN CASE. IF THIS WERE A ATTEMPTED – ENTRY CASE, HIS BELIEF THAT HE WAS A U.S. CITIZEN AND THEREFORE DID NOT NEED TO GET CONSENT – WHAT'S THE NAME OF THE CASE? IS IT *VALDIER* [sic] –

MS. BARROS: – *VALDIER* [sic] –

THE COURT: – THE *VALDIER* [sic] – THAT A GOOD FAITH HELD BELIEF THAT ONE IS A U.S. CITIZEN WOULD BE A DEFENSE TO ATTEMPTED ENTRY CASE BECAUSE OF THE SPECIFIC INTENT [26] REQUIREMENT.

AGAIN –

MS. BARROS: – AND IN LIGHT OF THE COURT'S RULINGS ON THOSE TWO ISSUES, WE WOULD NOT HAVE ANYTHING FURTHER, YOUR HONOR.

THE COURT: OKAY. BUT I THINK IT'S PRETTY CLEAR THAT YOU'VE PRESERVED THOSE TWO ISSUES FOR THE PURPOSES OF APPEAL IF HE'S FOUND GUILTY.

OKAY?

MR. HALL: AND I WOULD AGREE, YOUR HONOR.

THE COURT: OKAY. SO THE GOVERNMENT HAS RESTED. IS THERE A MOTION BY THE DEFENSE?

MS. BARROS: YES, WE WOULD ASK FOR AN –

THE COURT: AND THE COURT IS GOING TO DENY THAT MOTION. DO YOU WISH TO PRESENT ANY EVIDENCE?

MS. BARROS: NO, YOUR HONOR.

THE COURT: YOUR CLIENT UNDERSTANDS HIS RIGHT TO TESTIFY AND TO PRESENT EVIDENCE?

MS. BARROS: YES.

THE COURT: IS THAT CORRECT, SIR?

DEFENDANT FLORES-VILLAR: YES.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

v.

RUBEN FLORES-VILLAR

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 06CR0592-BTM

(Filed Oct. 5, 2007)

Elizabeth Barros, Federal Defender's Inc.
Defendant's Attorney

REGISTRATION NO. 48465198

THE DEFENDANT:

pleaded guilty to count(s) _____
X was found guilty on count(s) one of the superseding
after a plea of not guilty. indictment

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

Title & Section	Nature of Offense	Count Numbers
8 USC 1326(a)and(b)	Deported Alien Found in the United States	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been
found not guilty on count(s) _____

X The remaining count is dismissed on the motion of the United States.

Assessment: $100.00 payable at a rate of $2.00 per month through the Inmate Financial Responsibility Program.

X Fine ordered waived.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence or mailing address until all fines, restitution costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States Attorney of any material change in the defendant's economic circumstances.

September 26, 2007
Date of Imposition of Sentence

/s/ Barry Ted Moskowitz
BARRY TED MOSKOWITZ
UNITED STATES
DISTRICT JUDGE

Entered Date:

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FORTY-TWO (42) MONTHS.

/s/ Barry Ted Moskowitz
BARRY TED MOSKOWITZ
UNITED STATES
DISTRICT JUDGE

X The court makes the following recommendations to the Bureau of Prisons:
THE COURT RECOMMENDS THE DEFENDANT SERVE HIS SENTENCE IN AN FCI IN COLORADO

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ by 12:00 noon on or to this court by 2:00 p.m.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____
to _____ at _____,
with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED
STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

MANDATORY CONDITIONS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons unless removed from the United States.

The defendant shall not commit another federal, state or local crime.

The defendant shall cooperate as directed in the collection of a DNA sample, pursuant to 18 USC 3583(d).

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, but not more than 4 times per month, unless defendant is removed from the United States.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court. The defendant shall also comply with any special conditions imposed.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

x Submit to a search of person, property, residence, abode or vehicle, at a reasonable time and in a reasonable manner, by the probation officer.

x Not possess firearms, explosive devices, or other dangerous weapons.

x Not possess any narcotic drug or controlled substance without a lawful medical prescription.

x If deported, excluded, or allowed to voluntarily leave the United States, obey all laws federal, state and local and not reenter the United States illegally and report to the probation officer within 72 hours of any reentry to the United States; the other conditions of supervision are suspended while the defendant is out of the United States after deportation, exclusion, or voluntary departure.

___ Participate in a program of drug and alcohol abuse treatment including testing and counseling, with at least 1 to 8 tests per month and 1 to 8 counseling sessions per month as directed by the probation officer.

_x_ Report all vehicles owned or operated, or in which you have an interest, to the probation officer.

_x_ Not enter the United States illegally.

_x_ Cooperate as directed in the collection of a DNA sample.

___ Provide complete disclosure of all personal and business financial records to the probation officer when requested.

___ Resolve all outstanding warrants within sixty (60) days of release from custody.

___ Remain in your place of residence for a period of ___ days, except while working at verifiable employment, attending a religious services or undergoing medical treatment.

___ Successfully complete a residential drug program.

___ Complete ___ hours of community service in a program approved by the Probation Officer within ___ months.

___ Reside in a Residential Reentry Center for a period of ___ days commencing upon release.

____ Participate in a program of mental health treatment as directed by the probation officer. The Court authorizes the release of the presentence report and available psychological evaluations to the mental health provider, as approved by the probation officer. The defendant shall consent to the release of evaluations and treatment information to the probation officer and the Court by the mental health provider.

____ Not aid, assist, harbor or transport undocumented aliens.

____ Not associate with known alien smugglers.

____ Not associate with known drug traffickers or users.

____ Not enter Mexico without the written permission of the probation officer.

____ Maintain full-time employment or education or a combination of both.

____ Obtain G.E.D. by

____ If the defendant has complied with all conditions of Supervised Release for ___, Supervised Release may be terminated on application to the Court and good cause shown.

ELIZABETH M. BARROS, ESQ.
California Bar No. 2276269
FEDERAL DEFENDERS
OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101-5008
(619) 234-8467/Fax: (619) 687-2666
___ Retained X Appointed

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PRESIDING JUDGE: Hon. Barry Moskowitz	COURT REPORTER: Barbara Harris
UNITED STATES OF AMERICA, (Appellee/Respondent) Plaintiff, v. **RUBEN FLORES-VILLAR,** (Appellant/Petitioner) Defendant.	Case No. 06cr0592-BTM **NOTICE OF APPEAL (CRIMINAL)** (Filed Oct. 5, 2007)

Notice is hereby given that Ruben Flores-Villar, appellant/petitioner above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the:

(X) Final Judgment (Fed. R. Crim. P. 32(b))

(X) Sentence Only (18 U.S.C. § 3742); Sentence Imposed September 26, 2007.

( ) Order (Describe): _____.

entered in this proceeding on the 5th day of October, 2007.

DATED: October 5, 2007

/s/ E Barros
ELIZABETH M. BARROS*

Transcripts Required** X Yes _ No
Date Ordered October 9, 2007.
Date (X) Indictment & Superseding Indictment
( ) Information Filed 03/22/06 & 01/09/07.
Bail Status In Custody.
Will there be a request to expedite the appeal and set a schedule faster than that normally set? _ Yes X No
(NOTE: This does not alleviate requirement of filing a motion to expedite which must be done in accordance with FRAP 27.)

---

* Pursuant to Fed. R. Crim. P. 32(a)(2), the defendant may request the clerk to prepare and file the Notice of Appeal.

** If transcript required, transcript order form (CA9-036) must be completed and court reporter contacted to make arrangements for transcription.

536 F.3d 990

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ruben FLORES-VILLAR, Defendant-Appellant.
No. 07-50445.

Argued and Submitted July 17, 2008.
Filed Aug. 6, 2008.

Elizabeth M. Barros, Assistant Federal Public Defender, San Diego, CA, for the defendant-appellant.

Karen P. Hewitt, United States Attorney, William A. Hall, Assistant United States Attorney, San Diego, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California; Barry T. Moskowitz, District Judge, Presiding. D.C. No. CR-06-00592-BTM.

Before: CYNTHIA HOLCOMB HALL, PAMELA ANN RYMER, and ANDREW J. KLEINFELD, Circuit Judges.

RYMER, Circuit Judge:

Ruben Flores-Villar raises a challenge under the equal protection component of the Fifth Amendment's due process clause on the basis of age and gender to two former sections of the Immigration and Nationality Act, 8 U.S.C. §§ 1401(a)(7) and 1409 (1974), which impose a five-year residence requirement, after the age of fourteen, on United States citizen fathers –

but not on United States citizen mothers – before they may transmit citizenship to a child born out of wedlock abroad to a non-citizen. This precise question has not been addressed before, but the answer follows from the Supreme Court's opinion in *Nguyen v. INS*, 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001). There the Court held that § 1409's legitimation requirements for citizen fathers, but not for citizen mothers, did not offend principles of equal protection. Assuming, as the Court did in *Nguyen*, that intermediate scrutiny applies to Flores-Villar's gender-based claim and rational basis review applies to his age-based claim, we conclude that the residence requirements of §§ 1401(a)(7) and 1409 survive. As this is what the district court held in a published opinion, *United States v. Flores-Villar*, 497 F.Supp.2d 1160 (S.D.Cal.2007), and we see no other error, we affirm.

I

Flores-Villar was born in Tijuana, Mexico on October 7, 1974 to Ruben Trinidad Floresvillar-Sandez, his United States citizen biological father who was sixteen at the time, and Maria Mercedes Negrete, his non-United States citizen biological mother. Floresvillar-Sandez had been issued a Certificate of Citizenship on May 24, 1999 based on the fact that his mother – Flores Villar's paternal grandmother – is a United States citizen by birth.

His father and grandmother brought Flores-Villar to the United States for medical treatment when he was two months old. He grew up in San Diego with his grandmother and father. Floresvillar-Sandez is not listed on Flores-Villar's birth certificate, but he acknowledged Flores-Villar as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico on June 2, 1985.

On March 17, 1997 Flores-Villar was convicted of importation of marijuana in violation of 21 U.S.C. §§ 952 and 960; and on June 16, 2003 he was convicted of two counts of illegal entry into the United States in violation of 8 U.S.C. § 1325. He was removed from the United States pursuant to removal orders on numerous occasions: October 16, 1998, April 16, 1999, June 4, 1999, June 4, 2002, October 20, 2003, and March 28, 2005.

He was arrested again on February 24, 2006, and this time was charged with being a deported alien found in the United States after deportation in violation of 8 U.S.C. § 1326(a) and (b). He sought to defend on the footing that he believed he was a United States citizen through his father. Meanwhile, Flores-Villar filed an N-600 application seeking a Certificate of Citizenship, which was denied on the ground that it was physically impossible for his father, who was sixteen when Flores-Villar was born, to have been present in the United States for five years after his fourteenth birthday as required by § 1401(a)(7). The government filed a motion in limine to exclude evidence of derivative citizenship for the same reason,

which the district court granted. The court denied Flores-Villar's corresponding motion in limine, to be allowed to present evidence that he believed he was a United States citizen.

The district court found Flores-Villar guilty following a bench trial on stipulated facts.[1] It denied his motion for judgment of acquittal. Flores-Villar timely appeals his conviction.

II

When Flores-Villar was born, § 1401(a)(7) provided, in relevant part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> . . .
>
> (7) a person born outside the geographic limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at

[1] The stipulation provided that Flores-Villar was found in San Diego on February 24, 2006; he admitted that he did not apply for permission to reenter the United States legally after being deported; he crossed the border by walking east of Otay Mesa, California, on October 7, 2005; and no evidence was discovered that he had been granted permission to reenter.

> least five of which were after attaining the age of fourteen years.

8 U.S.C. § 1401(a)(7) (1974). Section 1409 provided:

> (a) The provisions of paragraphs (3) to (5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock . . . if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.
>
> . . .
>
> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1409(a), (c) (1974).

Thus, if a United States citizen father had a child out of wedlock abroad, with a non-United States citizen mother, the father must have resided in the United States for at least five years after his fourteenth birthday to confer citizenship on his child. But a United States citizen mother had to reside in the United States for a continuous period of only one year

prior to the child's birth to pass on citizenship. It is this difference that Flores-Villar claims makes an impermissible classification on the basis of gender and age.

In *Nguyen*, the United States citizen father of a child born in Vietnam to a Vietnamese mother challenged § 1409's imposition of different rules for obtaining citizenship depending upon whether the one parent with American citizenship is the mother or the father. There, the father complained about the affirmative steps a citizen father, but not a citizen mother, was required by § 1409(a)(4) to take: legitimation; a declaration of paternity under oath by the father; or a court order of paternity. Assuming, without deciding, that the intermediate level of scrutiny normally applied to a gender-based classification applies even when the statute is within Congress' immigration and naturalization power, 533 U.S. at 61, 121 S.Ct. 2053, and drawing on Justice Stevens's prior opinion in *Miller v. Albright*, 523 U.S. 420, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998), the Court identified two important governmental interests substantially furthered by § 1409's distinction between citizen fathers and citizen mothers. The first is "assuring that a biological parent-child relationship exists." *Id.* at 62, 121 S.Ct. 2053. Mothers and fathers are not similarly situated in this respect; the relation is verifiable from the birth itself in the case of the mother, while a father's biological relationship to the child is not so easily established. The second interest is ensuring "that the child and the citizen parent have

some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Id.* at 64-65, 121 S.Ct. 2053. The mother knows that the child is in being and has immediate contact at birth such that an opportunity for a meaningful relationship exists, whereas, as the Court put it, "[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father." *Id.* at 65, 121 S.Ct. 2053. Unlike an unwed mother, there is no assurance that the father and his biological child will ever meet, or have the kind of contact from which there is a chance for a meaningful relationship to develop. The Court emphasized that Congress need not ignore these realities for purposes of equal protection, and found that the means chosen – additional requirements for an unwed citizen father to confer citizenship upon his child – are substantially related to the objective of a relationship between parent and child, and in turn, the United States. *Id.* at 66, 121 S.Ct. 2053.

Although the means at issue are different in this case – an additional residence requirement for the unwed citizen father - the government's interests are no less important, and the particular means no less substantially related to those objectives, than in

Nguyen.[2] The government argues that avoiding stateless children is an important objective that is substantially furthered by relaxing the residence requirement for women because many countries confer citizenship based on bloodline (*jus sanguinis*) rather than, as the United States does, on place of birth (*jus soli*). We explained the conundrum in *Runnett v. Shultz*:

> One obvious rational basis for a more lenient policy towards illegitimate children of U.S. citizen mothers is that illegitimate children are more likely to be "stateless" at birth. . . . As the government notes, if the U.S. citizen mother is not a dual national, and the illegitimate child is born in a country that does not recognize citizenship by *jus soli* (citizenship determined by place of birth) alone, the child can acquire no citizenship other than his mother's at birth. This policy clearly demonstrates a "rational basis" for Congress' more lenient policy towards

---

[2] Like the Supreme Court in *Nguyen*, we will assume that intermediate scrutiny applies. The government makes a forceful argument that rational basis review should apply given Congress' broad authority under Article I, Section 8 of the Constitution in matters related to citizenship and immigration. *See Fiallo v. Bell*, 430 U.S. 787, 791-93, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). But we do not need to decide which level of review is the most appropriate, and we do not, for the equal protection challenge fails regardless of whether §§ 1401(a)(7) and 1409 are analyzed under intermediate scrutiny, a rational basis standard, or some other level of review in between.

> illegitimate children born abroad to U.S. citizen mothers.

901 F.2d 782, 787 (9th Cir.1990). While Flores-Villar points out that the opposite would be true in Iran, for example, where an illegitimate child born to an Iranian mother and a father who is not an Iranian citizen is regarded as having the father's nationality, this does not diminish the strength of Congress' interest in trying to minimize the risk of statelessness overall. As the Supreme Court remarked in a different context, statelessness is a deplored condition with potentially "disastrous consequences." *Trop v. Dulles*, 356 U.S. 86, 102, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). In any event, as *Nguyen* makes clear, we do not expect statutory classifications always to be able to achieve the ultimate objective. 533 U.S. at 70, 121 S.Ct. 2053.

Avoiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests. The means chosen substantially further the objectives. Though the fit is not perfect, it is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship. *See Nguyen*, 533 U.S. at 70, 121 S.Ct. 2053 (noting the difficult context of conferring citizenship, and reiterating that an "exceedingly persuasive justification" is established "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those

objectives.'") (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)); *see also Fiallo*, 430 U.S. at 791-93, 799 n. 8, 97 S.Ct. 1473 (indicating that congressional power is at its height with respect to immigration and citizenship, and that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area") (internal citations omitted).

Flores-Villar acknowledges that the prevention of stateless children is a legitimate goal, but contends that it cannot be furthered by penalizing fathers. In his view, the real purpose of the statute is to perpetuate the stereotypical notion that women should have custody of illegitimate children. Further, he suggests, the length of residence in the United States says nothing about the father-child relationship or the biological basis of that relationship. And understandably, Flores-Villar emphasizes that his father in fact had a custodial relationship with him. However, the Court rejected similar submissions by the father in *Nguyen*. As it explained:

> This line of argument misconceives the nature of both the governmental interest at issue and the manner in which we examine statutes alleged to violate equal protection. As to the former, Congress would of course be entitled to advance the interest of ensuring an actual, meaningful relationship in every case before citizenship is conferred. Or Congress could excuse compliance with the formal requirements when an actual

> father-child relationship is proved. It did neither here, perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie. Instead, Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop. Petitioners' argument confuses the means and ends of the equal protection inquiry; § 1409(a)(4) should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some other alternative.

533 U.S. at 69, 121 S.Ct. 2053. The residence differential is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth. Likewise, it furthers the objective of developing a tie between the child, his or her father, and this country. Accordingly, we conclude that even if intermediate scrutiny applies, §§ 1401(a)(7) and 1409 survive.

Sections 1401(a)(7) and 1409 satisfy rational basis review as well. Legislation is presumed valid, and "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Having passed intermediate scrutiny, the statutory scheme necessarily is rationally related to a legitimate

government purpose. This follows from *Runnett*. There we held that it was rational to adopt a more lenient policy for illegitimate children of United States citizen mothers who satisfied a residence requirement than for legitimate children whose mothers failed to meet a higher residency requirement. 901 F.2d at 787.

Flores-Villar contends that there is no rational reason to entrust an eighteen year old male to vote and serve in the military, yet restrict his ability to confer citizenship on his child when a woman, who has greater ability to choose where a child is born, can transmit citizenship to her children without a lengthy residence requirement. However, it is not irrational to believe that residence in the United States advances the objective of a link between the citizen, this country, and a foreign-born child born out of wedlock, and that the children of citizen mothers born out of wedlock abroad run a greater risk of being stateless than the children of citizen fathers. *Wauchope v. United States Department of State*, 985 F.2d 1407 (9th Cir.1993), upon which Flores-Villar relies, does not suggest otherwise. There, we found no rational reason for § 1993 of the Revised Statutes of 1874, which accorded to American citizen males, but not American citizen females, the right to pass on citizenship to their foreign-born offspring. *Id.* at 1416. The statutory scheme at issue here is different, and is supported by a different rationale that is in accord with *Miller*, *Nguyen*, and *Runnett*.

Rational basis review applies to the claim of age-based discrimination because age is not a suspect class. Flores-Villar's position is that, because it is legally and physically impossible for United States citizen fathers under age nineteen to confer citizenship upon their foreign-born, illegitimate children even if they have resided in the United States for ten years, whereas an unmarried citizen mother need only show one year of residence, the statutory scheme treats men under nineteen differently from similarly situated men over nineteen. He posits that allowing minor women to transmit their citizenship to their foreign born out-of-wedlock children, but not minor men, demonstrates there is no rational basis for such discrimination. Further, in his view, irrationality is shown by the fact that most states set the age of consent to engage in sexual relations, hence conception, at age sixteen. However, it is not irrational to believe that a United States citizen father who has spent at least five years in residence during his teenage years would have more of a connection with this country to pass on than, say, a father who lived in the United States between the ages of one and ten.

III

Flores-Villar also argues that §§ 1401 and 1409 violate substantive due process because these provisions interfere with personal decisions relating to marriage, procreation, family relationships, child rearing, and education, as well as with the child's fundamental right to parental involvement. He lacks

standing to pursue rights that belong to his father, however, as most of them do. Floresvillar-Sandez is not a party, and the record discloses no obstacle that would prevent him from asserting his own constitutional rights. *See Singleton v. Wulff*, 428 U.S. 106, 113-16, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1127 (9th Cir.2004) (noting the requirement for third-party standing that a hindrance exist to the third party's ability to protect his or her own interests); *see also Barrows v. Jackson*, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953) (third-party standing accorded because it "would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court"). The claimed right to parental involvement is personal to Flores-Villar, but he fails precisely to describe a right deeply rooted in the nation's history, as he must do in order to sustain a substantive due process violation. *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). In any event, we have already upheld similar requirements against similar challenges. *See, e.g., Runnett*, 901 F.2d at 787; *Uribe-Temblador v. Rosenberg*, 423 F.2d 717, 718 (9th Cir.1970).

IV

Given that his paternal grandmother was a United States citizen, Flores-Villar submits that *her* years of residence should be tacked on to his *father's* for purposes of avoiding constitutional infirmity and

meeting the statutory requirement of ten years residence. As we have concluded that § 1401(a)(7) passes constitutional muster, no need appears for the district court (or us) to impute the residency of Flores-Villar's paternal grandmother to avoid unconstitutionality. Regardless, the statute plainly speaks in terms of the residency of the citizen father; it provides no textual basis for imputing residency of a grandparent.

Flores-Villar contends that our decisions in *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir.2005), and *Lepe-Guitron v. INS,* 16 F.3d 1021 (9th Cir.1994), support construing § 1401(a)(7) to impute the residence of a citizen grandparent to a citizen father who has a child out of wedlock while still a minor. *Cuevas-Gaspar* and *Lepe-Guitron* indicate that in some instances involving cancellation or withholding of removal where the statute is silent on imputation, residency of a parent may be imputed to a minor child. But § 1401(a)(7) together with former § 1401(g) are clear that it is the *parent* who must have resided in the United States for the specified period. Section 1401(g) defines a citizen as "a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States" for the prescribed period. Retention of lawful status is, in any event, different from transmission of citizenship. *Cf. Runnett,* 901 F.2d at 784. It is one thing to impute residence when removal is at stake, another to impute it when citizenship is at

stake. We decline to import a theory of constructive residence to the clearly articulated, and more demanding, requirements for transmitting citizenship.

V

In the wake of *United States v. Smith-Baltiher*, 424 F.3d 913, 925 (9th Cir.2005), which permitted evidence of a defense of reasonable belief that a defendant charged with attempted illegal entry was a United States citizen, Flores-Villar sought leave to introduce evidence of his belief that he was a United States citizen. He contends that excluding it denied him a meaningful opportunity to present a defense and so violated the Sixth Amendment. We disagree. Attempted illegal entry – at issue in *Smith-Baltiher* – is a specific intent crime, but as *Smith-Baltiher* recognized, illegal reentry and being found in the United States is not. *Id.* at 924. As the crime charged is a general intent crime, Flores-Villar's mistaken belief is not a defense.

Neither *Staples v. United States*, 511 U.S. 600, 619, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), nor *United States v. Salazar-Gonzalez*, 458 F.3d 851, 855 (9th Cir.2006), is to the contrary. Both indicate that a general intent mens rea requires a defendant to know the facts that make what he does illegal. This means that the government had to prove beyond a reasonable doubt that Flores-Villar knew he was in the United States, not that the underlying action

(entering and remaining in this country) was itself illegal.

VI

Finally, Flores-Villar maintains that his conviction is unsupported by sufficient evidence because the government failed to prove that he lacked the consent of the Attorney General to reapply for admission. Entry without the Attorney General's consent is an element of the crime of illegal reentry under 8 U.S.C. § 1326. *United States v. Blanco-Gallegos,* 188 F.3d 1072, 1074 (9th Cir.1999). Flores-Villar's premise is that the stipulated facts merely established that he did not apply for permission to reenter the United States, which is the second step of the reentry process and is sought from the Department of State after the Attorney General first gives his permission to apply. *United States v. Cervantes-Flores,* 421 F.3d 825, 834 (9th Cir.2005). However, Flores-Villar points to nothing in the record indicating that he had sought consent to apply or that it had been granted and an application to reenter was pending. The clear inference from his admission, and the result of the record checks that were undertaken, is that Flores-Villar neither asked for, nor received, the Attorney General's permission to apply for reentry. He unquestionably did not get permission to reenter. In light of all the circumstances, including the fact that he also admitted walking across the border east of Otay Mesa, California, a rational trier of fact could

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RUBEN FLORES-VILLAR, Defendant-Appellant.	No. 07-50445 D.C. No. CR-06-00592-BTM Southern District of California, San Diego ORDER (Filed May 5, 2009)

Before: HALL, RYMER and KLEINFELD, Circuit Judges.

Judge Rymer and Judge Kleinfeld voted to deny appellant's petition for rehearing en banc. Judge Hall so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing en banc is DENIED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 22, 2010

Mr. Steven F. Hubachek
Federal Defenders of San Diego, Inc.
225 Broadway
Suite 900
San Diego, CA 92101-5008

Re: Ruben Flores-Villar
v. United States
No. 09-5801

Dear Mr. Hubachek:

The Court today entered the following order in the above-entitled case.

The motion of petitioner for leave to file *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUN 18 2010
OFFICE OF THE CLERK

No. 09-5801

In The
Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

REUBEN CAMPER CAHN
STEVEN F. HUBACHEK*
ELIZABETH M. BARROS
VINCENT J. BRUNKOW
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California
92101-5008
Telephone: (619) 234-8467
Steven_Hubachek@fd.org

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

538

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT'S DECISION IN NGUYEN V. INS, 533 U.S. 53 (2001), PERMITS GENDER DISCRIMINATION THAT HAS NO BIOLOGICAL BASIS?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. BECAUSE THE STATUTORY SCHEME IMPOSES GENDER-BASED DIFFERENTIAL RESIDENCE REQUIREMENTS, INTERMEDIATE SCRUTINY APPLIES	7
A. The Statutory Scheme for Acquisition of Citizenship by Non-Marital, Foreign-Born Children Discriminates Based On Gender	7
B. Intermediate Scrutiny Applies Because the Statutory Scheme Discriminates Based on Gender	10
C. The "Plenary Power" Doctrine Does Not Warrant Creation of An Exception to the Rule That Gender Discrimination Is Subject To Heightened Scrutiny	15
1. *Fiallo* Addresses the Admission of Aliens, Not Citizenship By Birth	15

TABLE OF CONTENTS – Continued

Page

2. The Classification of a Congressional Power as "Plenary" Does Not Exempt Congressional Action From Constitutional Scrutiny 17

II. BECAUSE THE DISCRIMINATORY SCHEME, PURPORTEDLY CREATED TO AVOID STATELESSNESS, CREATES THAT RISK FOR THE LEGITIMATED CHILDREN OF MEN, IT SURVIVES NEITHER INTERMEDIATE SCRUTINY NOR RATIONAL BASIS REVIEW 20

A. The Discrimination, Which the Government Justifies as an Attempt to Avoid Statelessness, Is Unwarranted Because Under the 1940 Act, and its Successors, the Foreign-Born Children of U.S. Citizen Men Also Faced Risks of Statelessness But Received Little or No Protection 21

1. Pre-1940 Legislative Background ... 23

2. Implementation of U.S. Citizenship Laws Prior To the 1940 Act With Respect to Non-Marital Births 24

3. The 1940 Act Allowed Women Freely To Transmit Citizenship To Non-Marital Children, But Created New Barriers to Transmission of Citizenship To Legitimated Children By Men 27

TABLE OF CONTENTS – Continued

Page

B. The Sex Discrimination Introduced By the 1940 Scheme, Which Continues Today In a Slightly Less Aggravated Form, Should Be Struck Down Under Either Intermediate Scrutiny or Rational Basis Review 34

1. Intermediate Scrutiny..... 34

a. The 1940 Hearings Reveal An Emphasis On Stereotype, Not Avoidance of Statelessness..... 35

b. The Sex Discrimination Is Not Substantially Related to the Goal of Avoiding Statelessness... 38

2. Because the 1940 Scheme Was Purportedly Intended to Ameliorate Statelessness Concerns Yet Created New Risks of Statelessness, It Is Irrational 41

III. THE COURT MAY REMEDY THE EQUAL PROTECTION VIOLATION 44

A. The INA's Severability Clause Demonstrates the Court Can Remedy the Equal Protection Violation..... 46

1. The Court Should Order Extension of Section 1409(c)'s Benefits..... 46

a. Extension Is Supported By A Strong Severance Clause 47

TABLE OF CONTENTS – Continued

Page

b. Section 1421(d) Does Not Extinguish the Court's Remedial Power 53

2. Alternatively, the Most Egregious Discrimination Can Be Remedied by Severing Application of the Requirement of 5 Years' Residence After Age 14 To Fathers of Non-Marital Children 59

B. If Section 1409 Violates the Equal Protection Clause, But the Court Cannot Remedy the Violation, the Conviction Should Be Reversed Because It Is Based On a Finding of Alienage Made Pursuant to an Unconstitutional Scheme 62

IV. PETITIONER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE USED TO DENY HIM CITIZENSHIP AND IMPRISON HIM 63

CONCLUSION 67

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution ..... App. 1

TABLE OF CONTENTS – Continued

Page

2. Nationality Act of 1940, ch. 876, § 201, Title I, ch. 2, 54 Stat. 1138-1139 ..... App. 1

3. Nationality Act of 1940, ch. 876, § 205, Title I, ch. 2, 54 Stat. 1139-1140 ..... App. 3

4. Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 301(a)(7), 66 Stat. 235-236 (1952) ..... App. 4

5. Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 309(c), 66 Stat. 238-239 (1952) ..... App. 4

6. Immigration and Nationality Act, as amended Nov. 14, 1986, Pub.L. 99-653, § 12, 100 Stat. 3657; 8 U.S.C. § 1401(g) ..... App. 5

7. Immigration and Nationality Act, as amended Nov. 14, 1986, Pub.L. 99-653, § 13, 100 Stat. 3657; 8 U.S.C. § 1409(c) ..... App. 6

8. Immigration and Nationality Act, Title IV, 66 Stat. 281 (1952); 8 U.S.C. § 1101, note entitled "Separability Provisions" ..... App. 6

9. Immigration and Nationality Act, ch. 477, Title III, ch. 2, § 310, 66 Stat. 239 (1952); 8 U.S.C. § 1421(d) ..... App. 6

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006).....45, 60, 61

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).....60

Buckley v. Valeo, 424 U.S. 1 (1976).....18

Caban v. Mohammed, 441 U.S. 380 (1979).....38, 40, 42

Califano v. Westcott, 443 U.S. 76 (1979).....*passim*

The Chinese Exclusion Case, 130 U.S. 581 (1889).....18

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).....40, 42, 44, 61

Craig v. Boren, 429 U.S. 190 (1976).....63, 66

Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).....19

Eisenstadt v. Baird, 405 U.S. 438 (1972).....65, 66

Fiallo v. Bell, 430 U.S. 787 (1977).....15, 16, 18

Frontiero v. Richardson, 411 U.S. 677 (1973).....10, 47

Gibbons v. Ogden, 22 U.S. 1 (1824).....18

Griswold v. Connecticut, 381 U.S. 479 (1965).....65

Gutierrez v. Ada, 528 U.S. 250 (2000).....57

Heckler v. Mathews, 465 U.S. 728 (1984).....46

INS v. Chadha, 462 U.S. 919 (1983).....17, 60

J.E.B. v. Alabama, 511 U.S. 127 (1994).....13, 24, 40

TABLE OF AUTHORITIES – Continued

Page

Jimenez v. Weinberger, 417 U.S. 628 (1974) 46

Johnson v. United States, 543 U.S. 499 (2005) 19

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 14, 19, 51

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 39

Kowalski v. Tesmer, 543 U.S. 125 (2004) 63

Lawrence v. Texas, 539 U.S. 558 (2003) 20, 41

Lindh v. Murphy, 521 U.S. 320 (1997) 58

Mackenzie v. Hare, 239 U.S. 299 (1915) 11

Marbury v. Madison, 5 U.S. 137 (1803) 18

Mathews v. Diaz, 426 U.S. 67 (1976) 16, 47, 49, 52

McGowan v. Maryland, 366 U.S. 420 (1961) 65

Miller v. Albright, 523 U.S. 420 (1998) ..... *passim*

Minor v. Happersett, 88 U.S. 162 (1874) 57

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 10, 35, 38, 40

Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972) 47

Nguyen v. INS, 533 U.S. 53 (2001) ..... *passim*

Powers v. Ohio, 499 U.S. 400 (1991) 63, 64, 65

Rogers v. Bellei, 401 U.S. 815 (1971) 11, 22

Soto Lopez v. New York City Civil Service Comm'n, 755 F.2d 266 (2d Cir. 1985) 47

TABLE OF AUTHORITIES – Continued

Page

Tennessee v. Garner, 471 U.S. 1 (1985) 49, 60

United States v. Booker, 543 U.S. 220 (2005) 47, 49, 50, 60, 62

United States v. Cohen, 179 F. 834 (2d Cir. 1910) 11

United States v. Flores-Villar, 497 F. Supp.2d 1160 (S.D. Cal. 2007) *aff'd*, 536 F.3d 990 (9th Cir. 2008) 1, 3, 44

United States v. Smith-Baltiher, 424 F.3d 913 (9th Cir. 2005) 56, 62, 66

United States v. Virginia, 518 U.S. 515 (1996) 10, 19, 20, 35, 38

United States v. Wong Kim Ark, 169 U.S. 649 (1898) 14, 22, 57, 58

Vance v. Terrazas, 444 U.S. 252 (1980) 51

Warth v. Seldin, 422 U.S. 490 (1975) 63

Wauchope v. U.S. Department of State, 985 F.2d 1407 (9th Cir. 1993) 15, 51

Weedin v. Chin Bow, 274 U.S. 657 (1927) 17, 29

Welsh v. United States, 398 U.S. 333 (1970) ..... *passim*

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 46, 62

Zadvydas v. Davis, 533 U.S. 678 (2001) 17, 19, 55

STATE CASE

Guyer v. Smith, 22 Md. 239, 1864 WL 1611 (1864) 25

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Fourth Amendment, U.S. Const. 49

Fifth Amendment, U.S. Const. 3

8 U.S.C. § 1101 ..... 17, 48, 54, 55

8 U.S.C. § 1326 2

8 U.S.C. § 1401 ..... *passim*

8 U.S.C. § 1409(c) ..... *passim*

8 U.S.C. § 1421 ..... *passim*

8 U.S.C. § 1445 56

8 U.S.C. § 1446 56

8 U.S.C. § 1447 56

8 U.S.C. § 1448 56

28 U.S.C. § 1254(1) 1

Act of March 26, 1790, ch. 3, 1 Stat. 104 17

Act of March 2, 1907, ch. 2534, 34 Stat. 1228 11

Act of May 24, 1934, ch. 344, 48 Stat. 797 ..... 12, 23

Nationality Act of 1940, ch. 876, 54 Stat. 1137 ... *passim*

Immigration & Nationality Act, ch. 477, 66 Stat. 163 (1952) ..... *passim*

ADMINISTRATIVE DECISIONS

22 U.S. Op. Att'y Gen. 162 (1920) 26

39 U.S. Op. Att'y Gen. 290 (1939) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

39 U.S. Op. Att'y Gen. 397 (1939) 12, 25

39 U.S. Op. Att'y Gen. 556 (1937) 26

In the Matter of M-, 4 I. & N. Dec. 440 (BIA 1951) 26, 37, 52

MISCELLANEOUS

The Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175 33

To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. (printed 1945) ..... *passim*

1 William Blackstone, *Commentaries On The Laws Of England* (17th ed. 1830) 11

Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) 25, 28, 36

Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669 (2000) 23, 25

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994) 46

Richard W. Flournoy, Jr. & Manley O. Hudson eds., *A Collection of Nationality Laws* (1929) 30

David H. Gans, *Severability As Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639 (2008) 49

TABLE OF AUTHORITIES – Continued

Page

7 Charles Gordon et al., *Immigration Law and Procedure* (Matthew Bender, Rev. Ed. 2010) 26

Myres S. McDougal et al., *Nationality and Human Rights: the Protection of the Individual in External Arenas*, 83 Yale L.J. 900 (1974).....31, 33

Note, *Citizenship By Birth*, 41 Harv. L. Rev. 643 (1928).....24, 26

Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99 (1934).....24, 26

Respondent United States' Brief, *Nguyen v. INS*, 2000 WL 1868100.....21, 32, 33

Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935).....22, 24, 30, 32

Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934).....22, 28, 29, 35, 39

S. Rep. No. 1137, 82d Cong., 2d Sess. (1952).....37, 58

U.N. Legislative Series, *Laws Concerning Nationality* (1954).....31

Frederick Van Dyne, *Citizenship of the United States* (1904).....25

http://treaties.un.org (last visited May 28, 2010).....33

OPINIONS BELOW

The court of appeals' and district court's orders are published, *United States v. Flores-Villar*, 497 F. Supp.2d 1160 (S.D. Cal. 2007), *aff'd*, 536 F.3d 990 (9th Cir. 2008). J.A. 135-46, 169-86.

JURISDICTION

The court of appeals' judgment was entered August 6, 2008. J.A. 169-86. Rehearing was denied May 5, 2009. *Id.* 187. The Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are in the appendix. App. 1-6.

STATEMENT

Petitioner, Ruben Flores-Villar, was born out-of-wedlock on October 7, 1974, in Tijuana, Mexico. J.A. 84-85, 91-92. His father, Ruben Trinidad Floresvillar, was then a 16-year-old U.S. citizen. *Id.* 63, 84. Although Petitioner's father would have testified at trial that he resided in the United States for at least ten years before Petitioner's birth, *id.* 84-87, he was too young to have five years' presence after turning

14 as required for transmission of citizenship under the version of 8 U.S.C. § 1401 effective at Petitioner's birth.

When two months old, Petitioner's father and paternal grandmother brought him into the United States for medical treatment. *Id.* 85-86. Thereafter, the hospital sent, on Petitioner's father's behalf, a letter to border authorities requesting a permit for Petitioner to enter the United States. *Id.* 94. Petitioner's mother authorized his release from the hospital to his paternal grandmother for adoption planning. *Id.* 95-96. Although Petitioner was not adopted, his mother took no part in his upbringing. *Id.* 86, 90.

Petitioner grew up in San Diego county with his father, attending local schools. *Id.* 86, 90, 101. Petitioner's father formally recognized him by filing a paternity acknowledgment in the Tijuana civil registry in 1985, when Petitioner was 11, and claimed Petitioner as his son on his United States income taxes. *Id.* 98-100, 102-10.

In 2006, Petitioner was indicted for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. *Id.* 5. On September 22, 2006, Petitioner filed an N-600 application seeking a Certificate of Citizenship. *Id.* 65-79. Petitioner's father and paternal grandmother submitted supporting declarations. *Id.* 84-90. On December 14, 2006, his application was denied:

> The fact of your legitimation is not in question. . . . Since your father was only sixteen at the time of your birth, it is physically impossible for him to have [the] required physical presence necessary (five years after age fourteen) in order for you to acquire United States citizenship through him.

Id. 63-64. This denial was affirmed by the Administrative Appeals Office. *Id.* 111-21, 126-34.

Petitioner nonetheless sought to defend against the section 1326 charge by contending that he is a citizen. *Id.* 155. The government moved to preclude the defense based on the reasoning of the N-600 denial. *Id.* 7-12. Petitioner responded that the statutory scheme in place at his birth violated the Fifth Amendment's equal protection guarantee. *Id.* 44-58. Petitioner sought a jury instruction applying the shorter physical presence requirement in 8 U.S.C. § 1409(c) to his father. *Id.* 123. His father would have testified in Petitioner's defense, *id.*, but the district court precluded the testimony. *Id.* 135-46, 155-56.

Because his defense was excluded, Petitioner consented to a bench trial. *Id.* 153. The district court found Petitioner guilty and sentenced him to 42 months' custody. *Id.* 158-60.

The Ninth Circuit affirmed, finding the statutory scheme did not deny equal protection. *Flores-Villar*, 536 F.3d at 996.

SUMMARY OF ARGUMENT

Since 1940, citizen fathers, but not citizen mothers, have been required to meet a lengthy residency requirement before transmitting citizenship to their foreign-born, non-marital children. The 1952 Act, effective at Petitioner's birth, perpetuated the discrimination, maintaining a physical presence requirement under which men below age 19 could not transmit citizenship. Age never prevented transmission of citizenship to a woman's non-marital child. Because this statutory scheme discriminates against fathers of non-marital children based on gender, it denies equal protection.

Intermediate scrutiny is warranted because of our Nation's history of sex discrimination in laws governing transmission of citizenship, and the significance of citizens' interest in transmitting citizenship to their children. The "plenary power" doctrine, which the Court has applied in the context of the entry of aliens into the United States, does not warrant some lesser standard of scrutiny, because acquisition of citizenship at birth is fundamentally different from the immigration or naturalization of an alien. Further, even if the plenary power doctrine applies, the classification of a congressional power as "plenary" does not exempt congressional action in that area from constitutional scrutiny.

Regardless, the discriminatory scheme at issue survives neither intermediate scrutiny nor rational basis review. While the government has consistently

contended that Congress adopted the discriminatory, sex-based residence requirements to avoid statelessness of non-marital children of U.S. citizen mothers, it has not met its burden to demonstrate that avoiding statelessness was the actual purpose of the discriminatory residency requirements. Moreover, the risk of statelessness applies to the non-marital children of U.S. citizen mothers *and* fathers. The discriminatory scheme actually creates new risks of statelessness for non-marital children of U.S. fathers. Thus, the "statelessness" rationale cannot justify the discrimination under any standard.

Nguyen v. INS, 533 U.S. 53 (2001), is not to the contrary. *Nguyen* approved distinctions that were biologically based: by delivering a child, a woman necessarily had strong evidence of parentage and at least an opportunity to form a relationship with the child. By requiring the father to take a formal act prior to the child's 18th birthday, the statutory scheme provided the evidence and opportunity that biology had guaranteed the mother. The residence requirements posed by the instant scheme have no biological basis: there is no reason to believe that mothers are more adept at forming ties to the United States than are fathers or that fathers' non-marital children experience statelessness in any different way.

The denial of equal protection effected by section 1409's gender discrimination can and should be fully remedied by extension of the benefit offered by section 1409(c) – the limited residence requirement –

to both men and women. Extension of benefits is a traditional remedy for equal protection violations and is supported by the INA's severability provision. Alternatively, severance of the application of former section 1401(g)'s requirement of 5 years' residence in the United States after age 14, which disables some younger men, but not younger women, from transmitting citizenship to their non-marital children, could partially remedy the discrimination against Petitioner's father such that Petitioner could at least offer evidence of his father's 10-year U.S. residence at trial. Even if the equal protection violation cannot be remedied by a grant of citizenship, the government nonetheless should be estopped from invoking that unconstitutional scheme to support a criminal conviction.

Finally, Petitioner meets the requirements of third party standing to litigate the gender discrimination against his father in defending against this government-initiated prosecution.

ARGUMENT

I. BECAUSE THE STATUTORY SCHEME IMPOSES GENDER-BASED DIFFERENTIAL RESIDENCE REQUIREMENTS, INTERMEDIATE SCRUTINY APPLIES.

A. The Statutory Scheme for Acquisition of Citizenship by Non-Marital, Foreign-Born Children Discriminates Based On Gender

Since 1940, citizen fathers, but not citizen mothers, have been required to meet a lengthy residency requirement before transmitting citizenship to their foreign-born, non-marital children. The 1940 Act required an unwed citizen father to demonstrate ten years' physical presence in the United States prior to the child's birth, five of which had to be after the age of sixteen. Nationality Act of 1940, ch. 876, §§ 201(g), 205; 54 Stat. 1137, 1139-40. Fathers under age 21 could not transmit citizenship. Prior residence of any length was sufficient for women. *See id.* § 205. The 1952 Act, in effect at Petitioner's birth, perpetuated the discrimination, maintaining the ten years' physical presence requirement, before the non-marital child's birth, five of which had to be after age 14. Immigration & Nationality Act (INA), ch. 477, Title III, ch. 1, §§ 301(a)(7), 309(a), 66 Stat. 163, 235-38 (1952). Men under 19 were disabled from transmitting citizenship. For women, the law required only one year's residence prior to the non-marital child's birth. *Id.* § 309(c). A woman's age never prevented transmission of citizenship to her non-marital child.

Petitioner was born out of wedlock, in Mexico, to a U.S. citizen father and an alien mother. Although his father legitimated and raised him in the United States from infancy, the district court precluded Petitioner's citizenship defense because his father's age at Petitioner's birth, 16, made it impossible to transmit citizenship. Because the statutory scheme discriminates against fathers of non-marital children by imposing a differential residence requirement based on gender, it denies equal protection.

Nguyen does not address this question. The issue there was whether a requirement that a father, but not a mother, legitimate a non-marital child before the child's eighteenth birthday comports with equal protection. 533 U.S. at 60. Congress sought to insure that all parents have the *opportunity* to establish a relationship with their non-marital children, but did not seek to guarantee establishment of an actual parent-child relationship. *Id.* at 64-65. Such an opportunity inheres in the event of birth in the case of a citizen mother and her child, but does not result, "as a matter of biological inevitability, in the case of an unwed father." *Id.* at 65. The legitimation requirement imposed on men, to be undertaken during the child's minority, compensates for that biological difference, ensuring that men have knowledge of the child's birth and the opportunity to develop a relationship with the child. *Id.* at 66-67.

The differential residence requirement at issue here has nothing to do with the opportunity to form a parent/child relationship; it relates only to ties to the

United States. No biological difference between men and women suggests that women form stronger ties to the United States in shorter time periods than men.

Nguyen also upheld the legitimation requirement because a person born to a citizen parent of either gender has the opportunity to acquire citizenship under the statutory scheme. *See id.* at 61-62. *Nguyen* recognized that a non-marital child could acquire citizenship from a citizen father, if a "minimal" effort was made to legitimate during minority. *Id.* at 70. The same is not true for the differential residency requirements imposed on unmarried citizen fathers and mothers. Despite Petitioner's father's establishment and formal recognition of a parent-child relationship, it was impossible for Petitioner's father to transmit citizenship because he was under 19-years-old at Petitioner's birth. In many cases, it will also be impossible to meet even the 10-year requirement because the residence period must precede the child's birth. In sharp contrast to the "minimal" requirements at issue in *Nguyen* – they can be met between birth and majority – Congress has erected often insurmountable hurdles to the conferral of citizenship on the children of unmarried citizen fathers by requiring, under the scheme applicable to Petitioner, that unmarried fathers, but not mothers, establish 10 years' physical presence prior to the child's birth, at least 5 years of which must be after the father's fourteenth birthday. *Compare id.* at 70-71 ("Congress has not erected inordinate and unnecessary hurdles

to the conferral of citizenship on the children of citizen fathers in furthering its important objectives."). *Nguyen*'s analysis does not control here.

B. Intermediate Scrutiny Applies Because the Statutory Scheme Discriminates Based on Gender.

Intermediate scrutiny applies to laws which discriminate on the basis of gender. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Heightened scrutiny applies to sex-based classifications because "our Nation has had a long and unfortunate history of sex discrimination." *Virginia*, 518 U.S. at 531 (citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). *See also Nguyen*, 533 U.S. at 91 ("The history of sex discrimination in laws governing the transmission of citizenship and with respect to parental responsibilities for children born out of wedlock counsels at least some circumspection in discerning legislative purposes in this context") (O'Connor, J., dissenting).

From 1790 until 1934, Congress enacted, consistently with common-law notions of coverture,[1]

---

[1] Blackstone explained that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every

(Continued on following page)

citizenship legislation that focused only on fathers, granting citizenship to the children of U.S. citizens born abroad so long as the father – with no mention of the mother – had, prior to birth of the child, resided in the United States. *See Rogers v. Bellei*, 401 U.S. 815, 825 (1971) (noting the consistent requirement from 1790 to 1934 that the father have resided in the United States prior to the child's birth). Notions of coverture also informed legislation depriving women who married aliens of their citizenship. The Expatriation Act of 1907 is illustrative:

> [A]ny American woman who marries a foreigner shall take the nationality of her husband. At the termination of the matrimonial relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228-29. The Court upheld this statute, explaining "[t]he identity of husband and wife is an ancient principle of our jurisprudence." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). *Accord United States v. Cohen*, 179 F. 834, 835 (2d Cir. 1910) ("the general trend of legislation has

---

thing . . ." 1 William Blackstone, *Commentaries On The Laws Of England* 441 (17th ed. 1830).

been constantly toward the recognition of the proposition that the husband is the head of the family and that his wife and minor children take his citizenship, it being inconsistent with the theory of our laws that the wife shall be a citizen and the husband an alien and vice versa.").

In 1934, Congress altered the citizenship scheme to allow for citizenship for children born abroad upon a showing of prior residence in the United States by a U.S. citizen mother *or* father. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797. Despite the paternally-focused text of the pre-1934 citizenship statutes, the State Department's practice was to grant citizenship to foreign-born children of unmarried U.S. citizen mothers. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 43 (printed 1945) (*1940 Hearings*). The coverture-inspired rationale was that in such cases the mother "stands in the place of the father." *Id.* 431.

In 1939, the Attorney General rejected that State Department practice. *See* 39 U.S. Op. Att'y Gen. 397 (1939); 39 U.S. Op. Att'y Gen. 290, 290-291 (1939). Shortly afterward, Congress codified the practice of freely allowing unwed mothers to confer citizenship on their foreign-born children, *see* Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138-1140, but simultaneously created the gender discrimination challenged here by imposing formidable, sometimes

insurmountable, barriers to the transmission of citizenship by fathers to legitimated, foreign-born children.

Explaining the proposed code, a State Department representative revealed the discriminatory assumption behind the law; a non-marital child would, naturally, be raised by her mother, not her father: "If the child only has one legal parent, because it is illegitimate, if that parent, the mother, is a national, the child acquires nationality." *1940 Hearings* 63. The coverture-inspired stereotype is that for an out-of-wedlock child, the sole parent is the mother, vindicating a tradition, presented to Congress, "under American law [in which] the mother 'has a right to the custody and control of [a non-marital] child as against the putative father, and is bound to control it as its natural guardian.'" *Id.* 431. Thus, materials provided to Congress specifically sought to justify the discrimination here on the notion the mother was "bound" to care for and control the non-marital child as its "natural guardian." If the unwed father *chooses* to participate – he is not stereotypically "bound" to do so – his parenting role is assumed to be secondary to that of the mother. The 1940 hearings thus reflect precisely the sort of "history which warrants the heightened scrutiny [the Court] afford[s] all gender-based classifications today," *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994), necessitating that the discrimination be justified by "'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *Id.* (citations omitted).

The significance of citizens' interest in transmitting citizenship to their children also supports heightened scrutiny. *See Miller v. Allright*, 523 U.S. 420, 476-78 (1998) (Breyer, J., dissenting). "Since the founding of our Nation, American statutory law, reflecting a long-established legal tradition, has provided for the transmission of American citizenship from parent to child – even when the child is born abroad." *Id.* at 471. While transmission of citizenship to children born abroad is statutory, not constitutional, it is a venerable attribute of citizenship. *See United States v. Wong Kim Ark*, 169 U.S. 649, 668-74 (1898) (tracing history of statutes permitting citizenship to descend to foreign-born children back to 1350 in England and 1790 in this country). Citizenship is "'a most precious right,'" *Miller*, 523 U.S. at 476-77 (Breyer, J., dissenting) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963)), and the inability of certain classes of U.S. citizens to transmit citizenship to their children born abroad impinges upon the "special" tie of parent to child. *See id.* at 477 (citations omitted). Both the history of gender discrimination and the significance of the "special tie" at stake "mean that courts should not diminish the quality of review – that they should not apply specially lenient standards – when they review these statutes." *Id.* at 478.

C. The "Plenary Power" Doctrine Does Not Warrant Creation of An Exception to the Rule That Gender Discrimination Is Subject To Heightened Scrutiny.

Nguyen, 533 U.S. at 72-73, pretermitted the question whether the plenary power doctrine, *see, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977), created an exception to the Court's holdings that gender discrimination is subject to intermediate scrutiny. It does not. First, acquisition of citizenship at birth is fundamentally different from the immigration or naturalization of an alien. Second, even if the plenary power doctrine applies, classifying a congressional power as "plenary" does not exempt congressional action from constitutional scrutiny.

1. *Fiallo* Addresses the Admission of Aliens, Not Citizenship By Birth.

Any deference owed to Congress in the context of the entry of aliens into the United States, *see Fiallo*, 430 U.S. 787, does not carry over into determination of who is a citizen as of birth. As four Justices explained in *Nguyen*, "[t]he instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place." *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting).[*] *Accord Wauchope v. U.S. Department of*

---

[*] The notion that "'Congress regularly makes rules that would be unacceptable if applied to citizens,'" *Fiallo*, 430 U.S. at

(Continued on following page)

State, 985 F.2d 1407, 1414 (9th Cir. 1993). A majority of Justices in *Miller* agreed. *See* 523 U.S. at 480 (Breyer, J., dissenting) ("The Court has applied a deferential standard of review in cases involving aliens, not in cases in which only citizens' rights were at issue."). *Accord id.* at 429 (op. of Stevens, J.). Moreover, acquisition of citizenship at birth "does not involve the same transfer of loyalties that underlies the naturalization of aliens." *Id.* at 478 (Breyer, J., dissenting).

The deference to Congress at the heart of *Fiallo* is focused on "the admission of aliens." 430 U.S. at 792. *See also id.* at 794 ("Congress has . . . exceptionally broad power to determine which classes of aliens may lawfully enter the country") (citation, internal quotation omitted). Even though *Fiallo*'s subject matter included grants of immigration preferences to the offspring of U.S. citizens, those children were aliens, not citizens. The children's alienage implicated the "power to admit or exclude foreigners." *Id.* at 795 n.6. A citizen as of birth is no "foreigner."

Application of the plenary power doctrine here is inconsistent with Congress's recognition that foreign-born citizens as of birth stand on different footing than aliens seeking to enter and naturalize. The 1940 Act's legislative history confirms that distinction. *See 1940 Hearings* 414 ("[P]ersons who were born abroad

---

792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)), presupposes alienage, undisputed in *Fiallo*, but not here.

of citizens of the United States and who acquired citizenship of the United States at birth . . . have never been termed 'naturalized citizens.'").[3] The First Congress shared that perspective: the 1790 Act stated that children born abroad to U.S. citizens "shall be considered as natural-born citizens," Act of March 26, 1790, ch. 3, 1 Stat. 103-04, honoring the English tradition in which children born abroad to subjects "were[, at the time of birth,] deemed natural-born subjects of that kingdom to all intents and purposes whatsoever." *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927).

The distinction between acquisition of citizenship by birth and naturalization continues: Congress declares a person who acquires citizenship by descent a citizen "as of the date of birth," 8 U.S.C. § 1409(a), while "naturalization" refers to "the conferring of nationality of a state upon a person after birth, by any means whatsoever." *Id.* § 1101(a)(23).

2. The Classification of a Congressional Power as "Plenary" Does Not Exempt Congressional Action From Constitutional Scrutiny.

The Court's recognition that "Congress must choose 'a constitutionally permissible means of implementing' [its immigration] power," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 940-941 (1983)), counsels against reading

[3] *See infra* at 54-58.

Fiallo so broadly as to embrace a Congressional authority to disregard the equal protection guarantee and permit gender discrimination in the transmission of U.S. citizenship as of birth. "[C]ongressional power is 'limited by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.'" *Id.* (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)). It is the Court's duty to ensure compliance with those limitations: "in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank." *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Thus, "a law repugnant to the constitution is void. . . ." *Id.*

Congress's plenary power over a particular subject matter does not lead ineluctably to the conclusion that no constitutional restraints can apply to the exercise of that power. "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (citation omitted). *See also Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (the commerce power "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."). Even where plenary, Congress's grant of authority must not

"be employed in such a manner as to offend well-established constitutional restrictions. . . ." *Id.* The Court has confirmed the applicability of the equal protection guarantee in various plenary power contexts. *See, e.g., Johnson v. United States*, 543 U.S. 499, 511 (2005) (operation of prisons, where "the government's power is at its apex"); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (Indian affairs). *See also Mendoza-Martinez*, 372 U.S. at 164-165 ("the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process.").

A constitutional grant of plenary power thus does not supplant the remainder of the Constitution: the immigration "power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695 (citations omitted). While reviewing an Act of Congress is the "gravest and most delicate duty this Court is called upon to perform," it must undertake that duty "with recognition of the transcendent status of our Constitution." *Mendoza Martinez*, 372 U.S. at 159 (quotation omitted). And the Constitution does not tolerate gender discrimination. *See, e.g., Virginia*, 518 U.S. at 531-33.

II. BECAUSE THE DISCRIMINATORY SCHEME, PURPORTEDLY CREATED TO AVOID STATELESSNESS, CREATES THAT RISK FOR THE LEGITIMATED CHILDREN OF MEN, IT SURVIVES NEITHER INTERMEDIATE SCRUTINY NOR RATIONAL BASIS REVIEW.

The differential residence requirements discriminate based on gender. Most harshly, the scheme applicable here made it impossible for a U.S. citizen father under age 19[4] to transmit U.S. citizenship, even to a legitimated child. For women, it is never impossible to transmit citizenship to a non-marital child due to age. The scheme thus discriminates in two significant ways: in some cases, it is impossible for a man to transmit citizenship to his non-marital children, and, in every case, a man must demonstrate longer residence.

The sex discrimination here should be subjected to a searching inquiry, whether pursuant to intermediate scrutiny, *see Virginia*, 518 U.S. at 533 ("The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to achievement of those objectives.") (quotations omitted) or rational basis review. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("We have been most likely

---

[4] *See* INA § 301(a)(7), 66 Stat. 236.

to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.") (citations omitted). The discrimination fails under either standard.

A. The Discrimination, Which the Government Justifies as an Attempt to Avoid Statelessness, Is Unwarranted Because Under the 1940 Act, and its Successors, the Foreign-Born Children of U.S. Citizen Men Also Faced Risks of Statelessness But Received Little or No Protection.

Nguyen approved section 1409's legitimation requirements because "the use of gender specific terms takes into account a biological difference between the parents." 533 U.S. at 64. No such claim can be made here: the government consistently contends that Congress adopted the discriminatory, sex-based residence criteria in sections 1401 and 1409 because the "*jus sanguinis* laws of other nations . . . create[d] a risk of statelessness among the foreign-born children of unwed citizen mothers." Cert. Opp. at 14; Respondent United States' Brief, *Nguyen v. INS*, 2000 WL 1868100, *17-19 (same); *Miller*, 523 U.S. at 430 n.8 (op. of Stevens, J.) (noting same government argument). The government claims Congress intended to ameliorate the risk of statelessness of foreign-born children of U.S. citizen parents, observing that, in 1940, "unless the law of the United States accommodated the *jus sanguinis* rules of other nations,

those children would not be citizens of any nation." *Id.*

Jus sanguinis countries determine citizenship based upon the parents' nationality rather than place of birth. *See Wong Kim Ark*, 169 U.S. at 667. In *jus soli* countries, place of birth controls. *See Bellei*, 401 U.S. at 828. The risk of statelessness arises upon birth in a *jus sanguinis* nation – because birth within that nation does not confer its nationality – when there are impediments to the child's claim of nationality through the child's parents. If the child acquires nationality through neither parent, statelessness results.

A "survey" submitted to Congress in 1938 indicated that "in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother." Cert. Opp. at 13-14 (citing *inter alia* Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935)). From this survey the government implies that a non-marital child born to U.S. citizen mother in a *jus sanguinis* nation would run a risk of statelessness in the event that the mother could not transmit her nationality to her child. *Id.* at 14. But non-marital, foreign-born children of U.S. citizen fathers were also at risk of statelessness. *See* Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 225 (1934).

While Petitioner disagrees it was the basis for the discrimination, there was a risk of statelessness on the part of the non-marital children of U.S. citizen mothers. That risk cannot justify the discrimination against U.S. citizen fathers and their children inherent in the statutory scheme, because the scheme did not protect the non-marital children of men from statelessness and, indeed, increased their risk. This gender discrimination therefore cannot survive rational basis review, let alone heightened scrutiny.

1. Pre-1940 Legislative Background

As of 1940, when Congress first adopted the instant sex-discrimination, it had never before explicitly addressed non-marital children born abroad. At least until 1934, the plain language of Nation's citizenship laws focused exclusively on fathers, making no textual provision for transmission of citizenship by women. *See Miller*, 523 U.S. at 461-65 (Ginsburg, J., dissenting) (tracing this history). The 1934 Act altered the citizenship scheme to allow for citizenship upon a showing of prior residence in the United States by a U.S. citizen mother *or* father. *See* Act of May 24, 1934, § 1, 48 Stat. 797.[5]

---

[5] A proposal addressing non-marital children failed. *See* Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669, 1695 (2000).

2. Implementation of U.S. Citizenship Laws Prior To the 1940 Act With Respect to Non-Marital Births.

Even though the pre-1940 statutes were silent as to non-marital births, and made no mention, prior to 1934, of mothers, the various statutory schemes were implemented in a manner such that the non-marital children of U.S. citizen mothers were granted U.S. citizenship, as were the legitimated, non-marital children of U.S. citizens fathers. *See* Sandifer, *A Comparative Study*, 29 Am. J. Int'l L. at 258-259. As to mothers, "the Department of State has for a long time followed the rule that an illegitimate child follows the nationality of the mother, in the absence of legitimation according to law by the father." *Id.* at 258. As to fathers, "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality. Although in the law of the United States there is no statutory rule providing specifically for cases of this kind, the Department of State in practice follows this majority rule." *Id.* at 259 (footnote omitted). The practice, as presented to Congress in the 1940 hearings, was that both the non-marital children of U.S. citizen mothers and the legitimated, non-marital children of U.S. citizen fathers were granted U.S. citizenship.

Sandifer's conclusion that women were able to pass citizenship to non-marital children enjoyed substantial contemporaneous support. *See* Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934); Note, *Citizenship By Birth*, 41 Harv. L.

Rev. 643, 646 (1928); Frederick Van Dyne, *Citizenship of the United States* 49 (1904). *But see* Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612 (1915). The contemporary understanding of the pre-1940 practice is the same. *See Miller*, 523 U.S. at 463 (Ginsburg, J., dissenting). That conclusion was presented to Congress in 1940. *1940 Hearings* 43, 431. Its basis was the common-law stereotype: "the mother in such a case stands in the place of the father." *Id.* 431.[6]

In 1939, the Attorney General reversed the *de facto* rule, concluding that women were unable to pass U.S. citizenship to non-marital children under pre-1934 law. *See* 39 U.S. Op. Att'y Gen. at 291; 39 U.S. Op. Att'y Gen. at 397-98. The State Department disagreed with that reading, and the Board of Immigration Appeals concluded that "[i]t was undoubtedly the purpose of the second paragraph of section 205 of the Nationality Act of 1940 to conclude that disagreement and give to such child, at birth, the

---

[6] This notion is consistent with the "soften[ing]," in the United States, of the common-law view "that nonmarital children were legally parentless." Collins, *When Fathers' Rights Are Mothers' Duties*, 109 Yale L.J. at 1692. *Cf. Guyer v. Smith*, 22 Md. 239, 1864 WL 1611, *4 (1864) (holding that foreign-born, non-marital sons of a U.S. citizen father by an alien woman were not U.S. citizens because they were "under our law *nullius filii*"). Under this view, the mother is effectively assigned parental responsibility with no need for an affirmative act by her. Men are given a choice as to whether they will assume responsibility, gaining concomitant parental rights, by opting to legitimate.

nationality status of its mother." *See In the Matter of M-*, 4 I. & N. Dec. 440, 444 (BIA 1951).

As of 1940, "if there has been legitimation [of a foreign-born child of a U.S. citizen father], then the child acquires citizenship through the father," *1940 Hearings* 62[7], a conclusion supported by an opinion issued by the Attorney General.

> The State Department has for many years held that a child born out of wedlock which, by the laws of its father's domicile has been legitimated, is a citizen of the United States. . . . There appear to be no considerations of public policy which require a different decision.

32 U.S. Op. Att'y Gen. 162, 164-65 (1920). *Accord* 39 U.S. Op. Att'y Gen. 556 (1937); Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. at 105 n.22; Note, *Citizenship By Birth*, 41 Harv. L. Rev. at 646. *See also* 7 Charles Gordon et al., *Immigration Law and Procedure* §§ 93.04[2][b][ii], [iii], pp. 93-44, 93-45 (Matthew Bender, Rev. Ed. 2010).

This practice, too, was questioned by the Attorney General in 1939. *See* 39 U.S. Op. Att'y Gen. at 291. While the Attorney General stopped short of rejecting the State Department practice, his opinion likely created uncertainty about the nationality of legitimated children of U.S. citizen fathers. A

---

[7] *Accord id.* 431.

non-legitimated child "obviously . . . could not acquire [citizenship] through the father." *1940 Hearings* 62.

Seen from the perspective of Congress in 1940, there were practices of conferring citizenship on both the non-marital children of women and the legitimated, non-marital children of men, even though the statutory schemes did not expressly address these non-marital children. Thus, those children had claims to U.S. citizenship.

The protection as to both groups of children was questioned subsequent to the passage of the 1934 legislation. The Attorney General, unlike the State Department, flatly declared that the non-marital children of women born before the 1934 Act would not be granted citizenship, *see* 39 U.S. Op. Att'y Gen. at 291, but also questioned the citizenship of legitimated children of American fathers. *Id.* The 1940 legislation thus represented an opportunity to codify the protections given non-marital children of women and the legitimated children of men.

3. The 1940 Act Allowed Women Freely To Transmit Citizenship To Non-Marital Children, But Created New Barriers to Transmission of Citizenship To Legitimated Children By Men.

Explicitly addressing non-marital children for the first time, Congress adopted section 205 of the Nationality Act of 1940, 54 Stat. 1139-1140, which

provided that men could transmit citizenship after satisfying an age-calibrated, 10-year residence requirement and upon legitimation of the child during the child's minority. As to women, section 205 provided that, absent legitimation, her non-marital child would be a U.S. citizen if she "had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of the outlying possessions." *Id.* The framework established in the 1940 Act remains in place today, albeit with a less onerous residence requirement.[8]

Commentary published before passage of the 1940 Act suggested the non-marital, foreign-born children of both men *and* women were at risk of statelessness. *See* Seckler-Hudson, *Statelessness* 218, 220-21, 224. *Accord* Borchard, *The Diplomatic Protection of Citizens Abroad* 612-13. If Congress had sought to alleviate concerns that the non-marital children of female U.S. citizens would be stateless, it accomplished that by providing for U.S. nationality for the non-marital children of women subject to a modest pre-birth residence requirement, of any length, in the United States. *See* Nationality Act of 1940, § 205, 54 Stat. 1139-1140. In *jus sanguinis* countries where the father would not transmit citizenship to his non-marital child, *see, e.g.*, Seckler-Hudson,

---

[8] Current law reduces the residence requirement applicable to men to 5 years and imposes a one-year requirement on women. *See* 8 U.S.C. §§ 1401(g), 1409(c).

Statelessness 218, the child would be granted U.S. citizenship. The requirement of pre-birth residence vindicates a well-established Congressional goal of ensuring that citizenship not pass through generations of expatriate citizens living outside the United States for their entire lives. *See Chin Bow*, 274 U.S. at 666-67.

But the 1940 Act's discriminatory residence requirements lead to very different results as to the children of U.S. citizen fathers, exposing many children of U.S. fathers to risks of statelessness and discouraging such fathers from legitimating their offspring. Congress would have been aware of a significant risk of statelessness on the part of the foreign-born, non-marital children of U.S. citizen fathers as the Attorney General had suggested that such children were not citizens even when legitimated. *See* 39 U.S. Op. Att'y Gen. at 291. "If, in these cases, the country of birth adhered strictly to the principle of *jus sanguinis* in determining nationality, these children had no effective citizenship, unless it was acquired through the mother." *See* Seckler-Hudson, *Statelessness* 221.

In stark contrast to its solicitousness as to the children of U.S. citizen mothers, Congress's response to this grave risk was to limit severely the ability of fathers to transmit citizenship to non-marital children, requiring lengthy residence (10 years) in the United States for legitimated children and making no provision for non-legitimated children. *See* Nationality Act of 1940, §§ 201(g), 205, 54 Stat. 1139-1140. The incongruity of this approach is illustrated by the

study cited to Congress in support of the proposed legislation.

> [T]he Department of State has for a long time followed the rule that an illegitimate child follows the nationality of the mother, in the absence of legitimation according to law by the father. It is significant to observe that the same *lacuna* exists in the statutory law of about half the states studied.

Sandifer, *A Comparative Study*, 29 Am. J. Int'l L. at 258.[9] *See also id.* at 259 ("The majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality."). Thus, as of 1940, many states attributed the mother's nationality to the non-marital child *unless* the father legitimated the child. The legitimated, non-marital children of U.S. fathers therefore faced the prospect of being denied the nationalities of their mothers by virtue of legitimation, leaving them dependent upon their U.S. citizen fathers to provide nationality.[10] The

---

[9] *See* Cert. Opp. at 13-14.

[10] The State Department's witness at the hearings on the proposed code identified a number of countries in which legitimation deprived a child of her mother's nationality. *See A Collection of Nationality Laws* 177 (Richard W. Flournoy, Jr. & Manley O. Hudson eds., 1929) (China); *id.* at 186 (Costa Rica, if the mother consents to legitimation); *id.* at 309 (Germany); *id.* at 501 (Rumania). In Iraq, citizenship could not be acquired through the mother, although a child born in Iraq whose father was ordinarily resident in Iraq at the time of the child's birth could opt for Iraqi citizenship upon attaining his majority (provided the child had not already acquired the nationality of a

(Continued on following page)

Congressional scheme, however, would often make it impossible for those fathers to fulfill that need.[11]

By requiring 10 years of residence, Congress created a serious risk that non-marital, legitimated children of U.S. citizen fathers would be rendered stateless unless the father met a stringent residence requirement that no mother of a non-marital child was obliged to satisfy. Moreover, Congress made it impossible, not merely difficult, for a non-marital, legitimated child born to a U.S. citizen father under age 21 to claim U.S. citizenship as of birth because at least 5 of the 10 years' residence in the United States must take place after age 16.[12]

---

foreign country). *Id.* at 349-350. In the Netherlands, a child could only acquire citizenship through the mother if "the child [was] born outside of wedlock [and] acknowledged only by the mother, provided that that mother, at the time of the birth, had the status of a Dutch national. . . ." *Id.* at 441. In other countries such as Japan and Monaco, a child born out of wedlock would only obtain the mother's nationality if the mother acknowledged the child before the father (or in Japan, if the father was unknown or had no nationality). *See id.* at 382, 437. In Jordan, the risk of statelessness would exist regardless of legitimation because citizenship is derived only through the father. *See* U.N. Legislative Series, *Laws Concerning Nationality* 274 (1954).

[11] The loss of nationality suffered by a child when the father legitimates is based upon a fiction of "constructive consent" to expatriation. *See generally* Myres S. McDougal et al., *Nationality and Human Rights: the Protection of the Individual in External Arenas*, 83 Yale L.J. 900, 972-73 (1974).

[12] Under the version of section 1401(g) applicable to Petitioner's father, the requirement was 5 years' residence after age 14. *See* INA § 301(a)(7), 66 Stat. 236.

Indeed, a U.S. citizen father who could not meet the residence requirements would be forced to consider carefully whether legitimation was in his child's interest, inasmuch as formal legitimation – even marriage to the child's mother – might result in statelessness, because a claim to the mother's nationality could be extinguished while at the same time no claim to U.S. citizenship would be possible. Children who were not legitimated, of course, would be able to claim the mother's nationality in approximately half the states that Sandifer surveyed. *See* Sandifer, *A Comparative Study of Laws*, 29 Am. J. Int'l L. at 258. Thus, Congress both visited statelessness upon many legitimated children of U.S. citizen fathers and perversely gave U.S. citizens who fathered non-marital children strong incentives not to legitimate their children.

The government conceded that rules denying citizenship to many legitimated, non-marital children of U.S. citizen fathers create a grave risk of statelessness, acknowledging that, under the 1940 scheme, "[t]here would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father." *See* Respondent's Brief, *Nguyen*, 2000 WL 1868100, *18 n.9.[13] Indeed, the government

---

[13] The government contended that the "problem . . . had been addressed by the first paragraph of Section 205, which provided that such children would be eligible for U.S. citizenship as a result of the same legitimation that might endanger the

(Continued on following page)

conceded that the risk of statelessness persists today, acknowledging in 2000 that "it remains the case that children born out of wedlock generally are recognized to have the citizenship of the mother *unless and until* legitimated or formally acknowledged by the father." *Id.* at *35-36 (emphasis added; footnote omitted). Thus, even today, U.S. citizen fathers who responsibly fulfill their obligations to their non-marital children run the risk of rendering those children stateless if the father cannot meet a residence requirement that is not imposed upon mothers of non-marital children.[14]

Even if statelessness concerns prompted differential residence requirements, concerns that the

---

child's foreign citizenship." *See* Respondent's Brief, *Nguyen*, 2000 WL 1868100, *18 n.9. The brief did not mention, however, that Section 205 offered no remedy at all to a child rendered stateless because his or her father was not old enough or because the father could not satisfy the 10-year residence requirement.

[14] While various international covenants have sought to eliminate statelessness risks by conditioning expatriation on the acquisition of a new nationality, the document which most directly addresses expatriation by way of legitimation, The Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175, *see* McDougal, et al., *Nationality and Human Rights*, 83 Yale L.J. at 974-75, has enjoyed little acceptance. According to the United Nations Treaty Collection, only 40 states have ratified the Convention, *see* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en#3 (last visited May 28, 2010), which, at any rate, was drafted nearly ten years after the 1952 statute that governs here was passed.

children of U.S. mothers might be stateless in no way justifies disabling a class of U.S. fathers – those under 21 under the 1940 Act and those under 19 under the 1952 Act – from transmitting citizenship to their legitimated children. No class of U.S. citizen mothers is so disabled from ensuring that her non-marital child has a nationality.

Thus, Congress in 1940 was faced with challenges to practices under which both the non-marital, foreign-born children of women and legitimated children of men had claims to U.S. citizenship. Congress codified the practice as to women bearing non-marital children, but adopted a discriminatory scheme that offered narrow protection to fathers. It exposed citizen-fathers' non-marital children to risks of statelessness if the fathers were younger, or could not meet a 10-year residence requirement, or had not legitimated their children. The 1940 Act therefore tolerated substantial risks of statelessness as to non-marital children of men.

B. The Sex Discrimination Introduced By the 1940 Scheme, Which Continues Today In a Slightly Less Aggravated Form, Should Be Struck Down Under Either Intermediate Scrutiny or Rational Basis Review.

1. Intermediate Scrutiny

Under intermediate scrutiny, the discrimination is presumptively unconstitutional. *J.E.B.*, 511 U.S. at

152, (Kennedy, J., concurring) (noting "a strong presumption that gender classifications are invalid"). The scheme can only be upheld if it is substantially related to an actual and important governmental objective. *Virginia*, 518 U.S. at 533. The government cannot demonstrate that avoiding statelessness, rather than perpetuating gender stereotypes, was the actual purpose. Nor can the government meet its burden to show an "exceedingly persuasive justification," for the gender-based classification, *Mississippi Univ.*, 458 U.S. at 731, because the scheme does little to lessen the risk of statelessness to non-marital children of men.

a. The 1940 Hearings Reveal An Emphasis On Stereotype, Not Avoidance of Statelessness.

"[A] tenable justification [for gender discrimination] must describe actual state purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-536. A "searching analysis" must be conducted to determine whether there is a close resemblance between the alleged objective and the actual purpose. *Id.* at 536. The Court has looked to both recent and distant history to determine whether the government's alleged objective is the actual purpose. *See id.* A searching inquiry into the 1940 Act's legislative history, our nation's historic discrimination against women in citizenship laws, and the nationality laws of other countries (which result in a significant risk of statelessness to the

foreign-born children of U.S. citizen fathers) does not support the government's claimed objective of avoiding statelessness.

The 1940 hearings contain no discussion of statelessness other than a reference to infants of unknown parentage found in outlying possessions. *1940 Hearings* 430. Nor is there discussion of why an effort to avoid statelessness would be served by sex discrimination in the context of non-marital births even though contemporaneous authority acknowledged that there was such a risk for legitimated children of men, *see* Seckler-Hudson, *Statelessness* 224, and the Attorney General had called into question the ability of fathers to transmit citizenship to such children. 39 U.S. Op. Att'y Gen. at 291. *Accord* Borchard, *The Diplomatic Protection of Citizens Abroad* 612-13.

In contrast, the hearings repeatedly refer to the stereotypical assignment of parental responsibility for a non-marital child to the mother, including statements that a non-marital child has only one parent, the mother, *1940 Hearings* 62-63, that the mother of a non-marital child "stands in the place of the father," *id.* 431, and that the mother is "bound to maintain [such a child] as its natural guardian." *Id.* (quotations omitted). The modest residence requirement imposed on mothers of non-marital children would preserve that assignment of responsibility while the onerous residence requirements substantially inhibited transmission of citizenship by non-marital fathers, thus reinforcing their secondary parental status.

The 1952 legislative history does not support a different conclusion. It does not address the gender-based differential residence requirements as to non-marital children; it explains why the legislation deleted a provision conditioning transmission of nationality by such a mother on the father's failure to legitimate:

> This provision establishing the child's nationality as that of the mother regardless of legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth.

S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). The amendment removed the theoretical risk of loss of U.S. nationality of a woman's non-marital child if the child was legitimated.[15] Ironically, that sort of expatriation gives U.S. citizen fathers an incentive not to legitimate: a legitimating U.S. father might deprive his non-marital child of the mother's nationality, leaving the child stateless if the father cannot meet the onerous requirements introduced in 1940. *See supra* at 29-34.

Congressional silence on statelessness in 1940 and 1952 is not the only evidence undermining the government's contention. The discriminatory scheme exacerbated risks of statelessness of legitimated children of U.S. citizen fathers and did nothing for

---

[15] *See Matter of M-*, 4 I. & N. Dec. at 443-44 (narrowly construing that provision).

non-legitimated children of men. *See supra* at 29-34. Thus, both the absence of any discussion of statelessness and the scheme's failure to address adequately the statelessness risks of the children of men suggest that avoidance of statelessness was not the actual purpose of the scheme. It is not an "exceedingly persuasive" justification, *Mississippi Univ.*, 458 U.S. at 731, but rather a *post hoc* rationalization for a gender-discriminatory statute.

b. The Sex Discrimination Is Not Substantially Related to the Goal of Avoiding Statelessness.

Even if the scheme was directed at diminishing statelessness, the government cannot demonstrate that the scheme was "substantially related to the achievement of [important government] objectives." *Mississippi Univ.*, 458 U.S. at 724 (quotation omitted). The stereotypes regarding the gender roles presented to Congress in the 1940 Hearings fall far short of justifying the sex discrimination here, particularly since Petitioner's father assumed full responsibility for his son. *See Caban v. Mohammed*, 441 U.S. 380, 394 (1979) ("The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers. . . .").

Nor can the standard be met here where the scheme protected women's non-marital children from statelessness, yet provided minimal protection to

non-marital children of men. The expansive protection that the scheme offers to women bearing non-marital children, but not to men fathering and legitimating non-marital children, is analogous to the policy of providing a "unique educational benefit only to males" that the Court struck down in *Virginia*: "However 'liberally' [that] plan serve[d] the Commonwealth's sons, it ma[de] no provision whatsoever for her daughters. That is not *equal* protection." 518 U.S. at 540.

"Because [the Court] require[s] a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification." *See Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) (citations omitted). *Accord Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000). The pre-1934 practice, as presented to Congress, was itself discriminatory: a non-legitimated child of a U.S. citizen "obviously" could not "acquire [citizenship] through the father," *1940 Hearings* 62, while non-marital children of women did. *Id.* 63. Non-legitimated children of men were at risk of statelessness, *see* Seckler-Hudson, *Statelessness* 221, and the 1940 Act did nothing to protect them.

To the extent there was any gender equivalence reflected in the pre-1934 status quo, it was that legitimated children of men could gain citizenship. *1940 Hearings* 62, 431. These children, too, were at risk of statelessness, *see* Seckler-Hudson, *Statelessness* 224, yet the 1940 scheme erected formidable

barriers – the differential residence requirements – to their acquisition of citizenship. The discriminatory scheme thus offered little protection to the non-marital children of men, and withdrew a substantial portion of the protection legitimated children enjoyed prior to the 1940 Act. *See 1940 Hearings* 431 ("a child born out of wedlock which . . . has been legitimated[ ] is a citizen . . . "). There is no "exceedingly persuasive justification," *see Mississippi Univ.*, 458 U.S. at 731, for granting nearly full protection for women bearing non-marital children, and only very narrow protection to fathers of non-marital children, particularly in light of the Court's recognition that there is no "universal difference between maternal and paternal relations at every phase of a child's development." *Caban*, 441 U.S. at 389.

Moreover, the 1940 legislation represented another iteration of the values underlying the discredited doctrine of coverture. By making it impossible for younger men to transmit citizenship to non-marital children and difficult for older fathers – thereby aiding fathers shirking their obligations – and by making it virtually automatic for all women to do so, regardless of age, the 1940 scheme, which has carried forward to the present day albeit in slightly less severe form, "is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting). Such discrimination, embracing "the very stereotype the law condemns," *J.E.B.*, 511 U.S. at 138 (quotation

omitted), frustrates the goal of "carry[ing] out the principle of equality between men and women in the matter of nationality," *1940 Hearings* 422, and denies equal protection, "which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citation omitted).

2. Because the 1940 Scheme Was Purportedly Intended to Ameliorate Statelessness Concerns Yet Created New Risks of Statelessness, It Is Irrational.

Nor can the scheme survive rational basis review. The Court has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). "[T]he tie of parent to child is a special one, which in other circumstances by itself has warranted special constitutional protection," *Miller*, 523 U.S. at 477 (Breyer, J., dissenting), yet the discrimination here prohibited Petitioner's father, who legitimated and raised his son, from transmitting citizenship even though "American statutory law has consistently recognized the rights of American parents to transmit their citizenship to their children." *Id.* (citations omitted). The scheme here "inhibits" this most significant "personal relationship [ ]," *see Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring), based on

the gender of the parent involved. *See Caban*, 441 U.S. at 394 (rejecting presumption that unwed fathers are "invariably less qualified" than non-marital mothers).

No rational legislative goal is served by codifying the ability of women to pass citizenship to non-marital children while simultaneously diminishing the ability of fathers to avoid statelessness of their non-marital children through legitimation. *See 1940 Hearings* 431. Because the 1940 scheme imposed substantial residence requirements that in some instances made transmission of citizenship to the children of men impossible – either because of the father's age or his lack of ten years' residence – it does not rationally advance the goal of decreasing statelessness. Indeed, the government conceded that under the 1940 scheme "[t]here would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father." Respondent's Brief, *Nguyen*, 2000 WL 1868100, *18 n.9.

In *City of Cleburne*, the question was whether there was a rational basis for requiring a permit for a group home for retarded persons when there was no permit required for a number of other high-density uses. *See* 473 U.S. at 447. While the City offered a number of justifications, the Court found that none offered a rational basis for the discrimination. *See id.* at 448-50.

Congress chose virtually to eliminate the risk of statelessness as to the non-marital children of women, and offered little protection to fathers of non-marital children, going so far as to preclude claims of citizenship by legitimated children who would have qualified under the pre-1934 practice. *See 1940 Hearings* 431. It is irrational to expose one group of children to a risk of statelessness while protecting another based on nothing more than the gender of the U.S. citizen parent, just as there was no basis for requiring one high-density use of real property to be supported by a permit while another is not. The government has never offered a reason why avoiding statelessness of the non-marital children of U.S. citizen women is a greater priority than avoiding statelessness of the non-marital, legitimated children of U.S. citizen fathers. Surely the non-marital children of men do not experience the condition of statelessness in any different way. Nor would fathers be any less interested than mothers in ensuring that their children have a nationality. *Cf. Caban*, 441 U.S. at 392 (concluding, in rejecting a scheme that allowed non-marital mothers, but not fathers, to object to adoption, that there was no "self-evident reason why as a class [such fathers] would be [more likely to object to adoption than mothers]").

There is no rational basis for believing that the non-marital children of men would have any lesser ties to the United States than did their counterparts

born to women.[16] In fact, there is a strong basis to conclude that the opposite is true. Men are required to legitimate their non-marital children as a precondition to transmitting citizenship. *See* INA § 309(a), 66 Stat. 238. That criterion does not apply to women, who transmit citizenship even if, like Petitioner's mother, they play no continuing role in their child's life. Fathers are required to demonstrate an actual tie between the U.S. citizen parent and the non-marital child. As was the case in *City of Cleburne*, there is no rational basis for the statutory scheme.

III. THE COURT MAY REMEDY THE EQUAL PROTECTION VIOLATION

The scheme denies equal protection by discriminating against fathers of non-marital children by requiring a 10-year overall residence requirement while women bearing non-marital children need demonstrate only one year. That discrimination can be remedied by extending the benefits of section 1409(c) to both men and women: "this Court has often concluded that, in the absence of legislative direction not to sever the infirm provision, 'extension, rather than nullification,' of a benefit is more faithful to the legislative design." *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting) (quoting *Califano v. Westcott*, 443 U.S.

---

[16] The Court of Appeals concluded otherwise, but it did not explain its conclusion. *See Flores-Villar*, 536 F.3d at 997.

76, 89-90 (1979)). Extension is the proper course here as it would fully remedy the constitutional violation.

Alternatively, the discrimination could be partially remedied by severing application of former section 1401(g)'s 5-year requirement to the fathers of non-marital children. That provision required 5 years' residence in the United States after age 14, thus disabling some younger men, but no women, from transmitting citizenship to their non-marital children. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem.").

The Court has power to grant either remedy. While Justices have argued that courts cannot grant citizenship, *see Miller*, 523 U.S. at 452 (Scalia, J., concurring), "[a] majority of Justices in *Miller* . . . concluded otherwise." *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring). Indeed, "the Court need not grant citizenship. The statute itself grants citizenship automatically, and 'at birth.'" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). Petitioner thus seeks the Court's exercise of its traditional remedial powers "so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." *Nguyen*, 533 U.S. 95-96 (O'Connor, J., dissenting) (citation omitted).

Finally, if the Court is powerless to remedy the equal protection violations, and Congress may disregard the equal protection guarantee in legislating

acquisition of citizenship at birth, then Petitioner stands convicted based upon an unconstitutional scheme. The government should be precluded from invoking that unconstitutional scheme to support a criminal conviction. *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

A. The INA's Severability Clause Demonstrates the Court Can Remedy the Equal Protection Violation.

1. The Court Should Order Extension of Section 1409(c)'s Benefits.

The constitutional defect here is that men, but not women, must meet a lengthy residence requirement as a precondition of transmitting citizenship to non-marital children. "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class the legislation was intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). *Accord Heckler v. Mathews*, 465 U.S. 728, 738-39 (1984); *Westcott*, 443 U.S. at 89. "In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." *Westcott*, 443 U.S. at 89 (citing *Jimenez v.*

Weinberger, 417 U.S. 628, 637-38 (1974); and *Frontiero*, 411 U.S. at 691 & n.25).[17] *Accord United States v. Booker*, 543 U.S. 220, 247 (2005); *Mathews*, 465 U.S. at 739 n.5. "[T]his Court regularly has affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class." *Id.* at 90 (collecting cases).[18]

a. Extension Is Supported By A Strong Severance Clause.

The susceptibility of the INA to extension of section 1409(c)'s remedial scheme to men as well as women is supported by the INA's severability provision. *See Westcott*, 443 U.S. at 90 (observing that "a strong severability clause . . . counsels against nullification"); *Welsh*, 398 U.S. at 364 (Harlan, J., concurring) ("While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may

---

[17] *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 252 (1994) ("In severing unconstitutional portions of statute one seeks to preserve as much of the statute as possible. Thus, broadening the statute accomplishes this goal, whereas whittling the statute down to nothing does not. Severance by nullification kills the patient along with the disease.").

[18] *See also Soto-Lopez v. New York City Civil Service Comm'n*, 755 F.2d 266, 280-81 (2d Cir. 1985) (remedying equal protection violation by extending benefits); *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466, 470 (10th Cir. 1972) (same).

properly be considered fixed by the legislative pronouncement on severability."). In short, the presence of a severability provision reveals a Congressional judgment that its scheme is not sacrosanct; there is sufficient flexibility to permit extension. In the equal protection context, the Court has interpreted that flexibility to permit remedial extension of benefits when such extension is consistent with Congressional intent. *See, e.g.*, *Westcott*, 443 U.S. at 89-91.

In *Westcott*, the Court reasoned that the "strong severability clause" contained in the legislation at issue "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *See* 443 U.S. at 90. Inasmuch as nullification here would visit significant burdens on the innocent offspring of unwed U.S. citizen mothers – they would risk expatriation and statelessness – *Westcott*'s observation is equally potent here. In fact, the severability clause here, *see* INA § 406, 66 Stat. 281, is essentially identical to both that in *Westcott*, which the Court described as "strong," *see* 443 U.S. at 90 & n.8, as well as the one Justice Harlan characterized as "broad" in *Welsh*, 398 U.S. at 364, and is therefore similarly "[i]ndicative . . . of the judicial mandate" to preserve the statutory scheme even if it is necessary to extend its coverage. *See id.* at 363-64. *See also Nguyen*, 533 U.S. at 94-95 (O'Connor, J., dissenting) (relying upon the INA's severability clause to support remedy of severing requirements imposed by section 1409(a) on fathers

but not mothers); *Miller*, 523 U.S. at 489 (Breyer, J., dissenting) (same).[19]

---

[19] Remedial extension of a statute's benefits is not analytically so different from severance. *Booker*, which severed two provisions of the Sentencing Reform Act, fundamentally changed federal sentencing based on the Court's conclusion that Congress would have preferred that remedy. *See* 543 U.S. at 246. *Booker* also implied a standard of appellate review, an action bearing a strong resemblance to the Court's extension of benefits cases. *See id.* at 260-62. In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), a statute authorized the use of deadly force against all fleeing felony suspects in violation of the Fourth Amendment. The Court did not strike the statute down on its face, but effectively read an exception into it, invalidating its application to cases where the fleeing suspect does not pose a "threat of serious physical harm." *Id.* at 11-12. Thus, the Court's remedial authority is not limited to excising language; it permits remedial actions that have the effect of "revising" statutes such that benefits are extended to excluded classes, *e.g.*, *Westcott*, 443 U.S. at 89-90, or an application of the statute's language is deleted. *E.g.*, *Garner*, 471 U.S. at 11-12. *See also* David H. Gans, *Severability As Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 654 (2008) (arguing that "[r]ather than removing parts of the statute enacted by the legislature, severing applications means adding new words to qualify what the legislature did."). The touchstone of the Court's approach is not formalistic adherence to excision from, instead of addition to, statutory language, but, rather, vindication of Congress's preference between remedial "revisions" and nullification. *See, e.g.*, *Mathews*, 465 U.S. at 738, 740 (indicating the Court would not extend the benefits at issue because Congress expressed its preference for invalidation in the event of unconstitutionality). The strong severance clause here supports the notion that Congress would prefer the scheme's preservation, in a modified form, to nullification. *See Westcott*, 443 U.S. at 90.

While the Court may grant relief "only if Congress likely would prefer [relief from the residence requirements imposed on fathers of non-marital children], rather than imposing similar requirements upon mothers[,]" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting), the severability clause provides support for the notion that the Court may ascertain which course Congress would prefer. *See Welsh*, 398 U.S. at 355-56 (relief can be justified "by a different type of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional.") (Harlan, J., concurring) (citations omitted). *Accord Booker*, 543 U.S. at 246 ("We answer the remedial question by looking to legislative intent.").

In *Westcott*, a statutory scheme granted benefits to children of unemployed men but not to children of unemployed women, and the Court affirmed the lower court's decision to remedy that inequity by extending benefits to children of unemployed women. 443 U.S. at 91-93. The Court rejected a remedy that would terminate benefits to the class Congress intended to benefit, children of the unemployed. *See id.* at 92.

Here, in a manner analogous to the remedy granted in *Westcott*, the Court should "order[] that ['mother' in section 1409(c)] be replaced by its gender neutral equivalent." *Id.* If the government is correct that Congress's motivation for the discriminatory

scheme was to avoid the possibility of statelessness, nullification of section 1409(c) and application of the residence requirement to women would frustrate that goal in many cases. Non-marital children born abroad to mothers who could not meet the age or residence criteria would be denied U.S. citizenship and risk statelessness.

Even if the government is not correct, there is no reason to believe that Congress would wish to create the risk of statelessness that would result if nullification was chosen over extension. Citizenship is a "most precious right," *Mendoza-Martinez*, 372 U.S. at 159, and transmission of citizenship by mothers to non-marital children has been the norm since at least 1912. *See 1940 Hearings* 431. There is no reason to believe Congress would prefer compromise of that tradition to extension. Nullification – and the imposition of onerous residence requirements – is also impractical, calling into question rights to U.S. citizenship that vested at birth as to individuals not before the Court. *See* 8 U.S.C. § 1409(c) (citizenship "acquired at birth"). *See also Wauchope*, 985 F.2d at 1417 (observing as to a similar claim, "[n]o one has suggested [that the violation should] be remedied by invalidating the statute, thereby stripping citizenship from the foreign-born offspring of male citizens."). Citizenship cannot be taken away absent a showing that the citizen committed some expatriating act and "also intended to relinquish his citizenship." *Vance v. Terrazas*, 444 U.S. 252, 261 (1980). In short, revoking citizenship conferred at birth "would undoubtedly

lead to many strange results." *In the Matter of M-*, 4 I. & N. Dec. at 445. Because nullification would create risks of statelessness (and also frustrate what the government claims is a primary Congressional goal), interrupt a long-standing tradition of citizenship transmission, and expose citizens at birth to expatriation, "extension, rather than nullification, is the proper course." *Westcott*, 443 U.S. at 89.

While it is true that Congress did intend to narrow the ability of U.S. citizens to transmit citizenship to foreign-born children with less substantial ties to the United States, the Court must "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Welsh*, 398 U.S. at 356 (Harlan, J., concurring) (citations omitted). *Accord Mathews*, 465 U.S. at 739 n.5. If the government's interpretation is correct, Congress viewed the goal of narrowing access to U.S. citizenship as secondary to the avoidance of statelessness. And there is no reason to believe that statelessness of citizen fathers' children is any less worthy of avoidance. Thus, the "intensity of commitment" to limitation of the ability to transmit citizenship to foreign-born children does not counsel against extension because Congress has already demonstrated that its commitment to avoidance of statelessness is of surpassing importance. Even if statelessness prevention was not Congress's purpose, "the degree of potential disruption of the statutory scheme [resulting from] extension," *id.*, is

minimal: relief would be limited to legitimated children of men, *see Nguyen*, 533 U.S. at 62, and children legitimated by their citizen fathers are likely to have strong ties to the United States, as is true for Petitioner.

b. Section 1421(d) does not extinguish the Court's remedial power.

Language in 8 U.S.C. § 1421(d), referring to naturalization, does not prevent application of the severance provision to citizenship at birth. Section 1421(d), contained in a provision entitled "Naturalization authority," provides that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter." *Id.* In *Miller* and *Nguyen*, Justices debated, but did not resolve, the relevance of section 1421(d) to the question whether Congress would prefer nullification of the scheme to exercise of the Court's remedial powers to address the gender discrimination worked by section 1409. *Compare Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting), and *Miller*, 523 U.S. at 489-90 (Breyer, J., dissenting), *with Nguyen*, 533 U.S. at 72-73 (dicta),[20] and *Miller*, 523 U.S. at 457-58 (Scalia, J., concurring).

---

[20] *See Nguyen*, 533 U.S. at 72 ("In light of our holding that there is no equal protection violation, we need not rely on [the section 1421(d)] argument.").

The dissents in both *Miller*, 523 U.S. at 490 (Breyer, J.), and *Nguyen*, 533 U.S. at 95 (O'Connor, J.), conclude that section 1421(d) does not diminish the force of the severability provision as to statutes regulating the acquisition of citizenship at birth because naturalization differs from acquisition of citizenship at birth. "'[N]aturalization' means the conferring of nationality of a state upon a person *after* birth. . . ." 8 U.S.C. § 1101(a)(23) (emphasis added). Section 1421(d), part of the "naturalization" scheme, thus applies only to acquisition of nationality after birth. The statutes at issue here address citizenship acquired at birth. *See* 8 U.S.C. §§ 1401 ("at birth"); 1409(a) ("as of the date of birth"); 1409(c) ("at birth"). Section 1421(d) speaks to a different mode of acquiring citizenship.

Unlike the severability provision, which applies only in the event that a provision or application of the INA is found unconstitutional, section 1421(d) "does not specifically address the scenario where a particular provision is held invalid." *Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting).[21] Thus, section 1421 does not, by its terms, discourage application of the Court's traditional remedial approach.

The *Nguyen* majority acknowledges the tension between "naturalization" and citizenship acquired at birth, 533 U.S. at 72, but concludes that because "[t]he conditions specified by § 1409(a) for conferral of

---

[21] The *Nguyen* majority opinion did not address this point.

citizenship . . . must take place after the child is born, . . . [s]ection 1409(a) . . . is subject to the limitation imposed by § 1421(d)." *Id.*[22] The structure of section 1421 and its legislative history undercut that conclusion.

The structure of section 1421 strongly suggests that section 1421(d) does not apply to citizenship at birth, but is, rather, limited to the administrative naturalization of aliens. The Proposed Code, that became the 1940 Act, contained chapters entitled "Nationality at Birth" and "Nationality Through Naturalization;" what became section 1421 was in the latter. *See 1940 Hearings* 407, 434. That distinction is maintained today, with citizenship at birth found in

---

[22] This reading of sections 1101(a)(23) and 1421(d) exacerbates the equal protection violation here. The post-birth "conditions" to which the *Nguyen* majority refers apply only when the father is the source of the citizenship claim. *See* 8 U.S.C. § 1409(a). There are no post-birth criteria applicable when a child born out-of-wedlock claims citizenship through a U.S. citizen mother. *See* 8 U.S.C. § 1409(c). Consequently, under the *Nguyen* dicta, section 1409 claims made through citizen fathers are statutory "naturalization" claims subject to section 1421, while claims made through U.S. citizen mothers are not. Under this reasoning, any judicial authority to remedy the equal protection violation occasioned by the differential residence requirements of sections 1409(a) and (c) is frustrated by the complementary discrimination against fathers worked by the differential application of section 1421. The Court's canon of avoidance of constitutional doubt, *see, e.g., Zadvydas*, 533 U.S. at 689, counsels in favor of construing any ambiguity in section 1101(a)(23)'s definition of "naturalization" such that section 1421(d) does not apply to citizenship acquired as of birth.

Part I of Subchapter III of the INA and naturalization in Part II.

Section 1421 is entitled "Naturalization authority." It assigns naturalization authority to the Attorney General, *see* 8 U.S.C. § 1421(a), and includes two additional subsections, (b) and (c), that relate to the naturalization of aliens, not citizenship at birth. Subsection (b) addresses the oath of allegiance and renunciation. *See* 8 U.S.C. §§ 1421(b) and 1448. Neither section 1401 nor 1409 requires an oath. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005) (derivative citizen doesn't need certificate of citizenship).

Similarly, section 1421(c) provides for judicial review of a denial of a naturalization application after a hearing under 8 U.S.C. § 1447(a). *See* 8 U.S.C. § 1421(c). A section 1447(a) hearing is a proceeding before an immigration officer that takes place if a petition for naturalization is denied after an examination under 8 U.S.C. § 1446. *See* 8 U.S.C. § 1447(a). Applications for naturalization are filed under 8 U.S.C. § 1445, and can only be filed by persons who "have attained the age of eighteen years," *see* § 1445(b), and who can make "an averment of lawful admission for permanent residence." *See id.* Neither of those criteria are required when a non-marital child seeks citizenship though a U.S. citizen parent.

Both sections 1421(b) and (c) relate to naturalization of aliens, not grants of citizenship at birth to the offspring of U.S. citizens. The term "naturalization,"

used by Congress in a provision which concerns the naturalization of aliens, should be "'known by [its] companions,'" *see Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (citations omitted), and construed to refer only to the naturalization of aliens and not grants of citizenship at birth.

The legislative history strongly supports that construction. The term "naturalization" was employed "according to the usual acceptance of the term in the United States [which] undoubtedly means the grant of a new nationality to a natural person after birth." *1940 Hearings* 414. The Explanatory Comments transmitted with the Proposed Code acknowledged that the Court's cases had given the term "naturalization," as employed in the Constitution, a different, and more broad, meaning in which the term was "intended to cover cases in which citizenship might be conferred by statute at birth upon children born to citizens of the United States in foreign lands." *Id.* (citing *Minor v. Happersett*, 88 U.S. 162, 168 (1874), and *Wong Kim Ark*, 169 U.S. at 672, 702-03). Those Comments eschewed the Court's broad definition: "it does not follow that in the proposed new act the narrower meaning indicated by the definition under discussion cannot properly be used, especially as this meaning is now universally attributed to the word." *Id.* Thus, Congress did not understand the term "naturalize" to refer to persons seeking citizenship as of birth; persons claiming citizenship in that manner "have *never* been termed 'naturalized citizens.'" *Id.* (emphasis added).

Congress similarly would not have understood that section 1421(d) had any application to claims of citizenship at birth under sections 1401 and 1409.[23] In short, "Congress does not believe that this kind of citizenship involves 'naturalization.'" *Miller*, 523 U.S. at 480 (Breyer, J., dissenting). The government conceded that this was the correct reading of the legislative history in *Nguyen*. *See* 2000 WL 1868100 at *28-29. Section 1421(d) does not apply to claims of citizenship as of birth.

Because section 1421(d) is directed to the naturalization of aliens, rather than citizenship at birth, that provision gives rise to a negative implication that Congress did not intend to limit the courts' ability to remedy constitutional defects in its scheme granting citizenship at birth. *See generally Lindh v. Murphy*, 521 U.S. 320, 330 (1997). The negative implication is strongly supported by Congress's adoption of limitations on judicial intervention in naturalization cases while at the same time adopting a definition of naturalization that excluded citizenship at birth claims. *See id.* Congress could easily have expanded its definition of "naturalization" to the constitutional meaning of the term, *see Wong Kim Ark*, 169 U.S. at 702, or included citizenship at

---

[23] Congress had the same understanding of the dichotomy between citizenship by birth and naturalization in 1952, observing that the 1940 Act "defined who are citizens at birth and who may or who may not become citizens by naturalization." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952).

birth claims in section 1421(d) if it had wished to cabin the courts' remedial powers. It did neither.

2. Alternatively, the Most Egregious Discrimination Can Be Remedied by Severing Application of the Requirement of 5 Years' Residence After Age 14 To Fathers of Non-Marital Children.

In *Miller*, Justice Breyer argued that, had there been a finding of an equal protection violation as to section 1409(a)'s various legitimation-related criteria, "[t]he remedy is simply striking from the statute the two subsections that offend the Constitution's equal protection requirement, namely, subsections (a)(3) and (a)(4)." 523 U.S. at 488 (Breyer, J., dissenting). *Accord Nguyen*, 533 U.S. at 94-96 (O'Connor, J., dissenting). Such relief would not be a judicial grant of citizenship, but, rather, a declaration that the statute, with its unconstitutional portions severed, granted citizenship. *Id.* at 488-89.

The severance provision states: "If any particular provision of the Act, *or application thereof to any person or circumstance*, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." INA § 406, 66 Stat. 281 (emphasis added). The Court has "concluded that this severability clause 'is unambiguous and gives rise to a presumption that Congress did not intend the validity of the [INA] as a whole, or any part of the

[INA], to depend on whether' any provision was unconstitutional." *Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting) (quoting *Chadha*, 462 U.S. at 932) (brackets in original). Thus, the Court may sever either provisions *or* applications of the statute.

The authority to sever applications is significant because the Court "prefer[s] . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . . or to sever its problematic portions while leaving the remainder intact." *See Ayotte*, 546 U.S. at 328-29 (citations omitted). *See also Booker*, 543 U.S. at 320-21 (Thomas, J., concurring and dissenting) (concluding that in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-07 (1985), and *Garner*, 471 U.S. at 4, "the Court recognized that the unconstitutional applications of statutes were severable from the constitutional applications."). In *Ayotte*, for example, the Court remanded for state courts to determine whether a state legislature would prefer injunctive or declaratory relief to invalidation of a parental notification statute. The statute was defective for failure "explicitly [to] permit a physician to perform an abortion in a medical emergency without parental notification." *Id.* at 324. There was no dispute that "it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks." *Id.* at 328. The Court remanded, reasoning that it was unclear whether the state legislature would have preferred total invalidation of the scheme to the "issu[ance of] a declaratory judgment and an injunction prohibiting the statute's

unconstitutional application." *Id.* at 331. Thus, the Court necessarily concluded that the constitutional defect could be cured by severing the application of the notification statute as to minors facing medical emergencies as a result of which parents cannot be notified.

The same reasoning applies here. As applied, the statute, purportedly enacted based upon a desire to avoid statelessness, completely disables some fathers from transmitting citizenship under circumstances in which mothers can do so. In addition to violating the constitutional "directi[ve] that all persons similarly situated should be treated alike," *City of Cleburne*, 473 U.S. at 439, the scheme creates, as to the non-marital children of men, the very risk of statelessness that it remedies as to the non-marital children of women. Severing application of the requirement of 5 years' residence after age 14 will at least make it possible for men fathering non-marital children to transmit citizenship and help their children avoid statelessness, and would permit Petitioner to present his defense.

The Court "can excise the [unconstitutional application] only if Congress likely would prefer [its] excision, rather than imposing similar requirements on mothers." *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). Congress would prefer excision of this application for all the reasons discussed above, including the risk of statelessness that would be created by nullification. Moreover, severance of this application would result in even less "potential disruption of the

statutory scheme," *Welsh*, 398 U.S. at 365 (Harlan, J., concurring), because it would extend relief only to fathers who both legitimated their children and met the 10-year residence requirement. Excision of the 5-year requirement "is . . . compatible with the Legislature's intent as embodied in the [INA]." *See Booker*, 543 U.S. at 246.

B. If Section 1409 Violates the Equal Protection Clause, But the Court Cannot Remedy the Violation, the Conviction Should Be Reversed Because It Is Based On a Finding of Alienage Made Pursuant to an Unconstitutional Scheme.

If the Court concludes it cannot remedy the instant denial of equal protection, Petitioner's conviction should nonetheless be reversed. Petitioner challenges a criminal conviction that required, as an element, a finding of alienage. *Smith-Baltiher*, 424 F.3d at 921. Even if Petitioner cannot be made a citizen based upon the constitutional violation, he should have been able to defend on the theory that the government cannot invoke a scheme that violates equal protection in order to imprison him. *See Yick Wo*, 118 U.S. at 374.

IV. PETITIONER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE USED TO DENY HIM CITIZENSHIP AND IMPRISON HIM

As a "prudential limitation" on standing, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Third party standing is appropriate, however, when: 1) "the party asserting the right has a 'close' relationship with the person who possesses the right," and 2) "there is a 'hindrance' to the possessor's ability to protect his own interest." *Id.* at 130 (citing and quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Moreover, the Court is "quite forgiving with these criteria . . . 'when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Id.* (quoting *Warth*, 422 U.S. at 510). Petitioner's claim – based upon gender discrimination leveled at his father – meets these requirements.

Seven Justices agreed that a child had third-party standing to raise an equal protection challenge based on the discriminatory impact on a parent in *Miller*. *See* 523 U.S. at 432-33 (Op. of Stevens, J.) (citing *Craig v. Boren*, 429 U.S. 190, 193-97 (1976)); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-75 (Breyer, J., dissenting). As Petitioner's claim arises

from a criminal prosecution and relates to an element of the offense, he stands on even firmer ground.

Petitioner, who has been both denied citizenship and imprisoned based upon an offense for which alienage is an element, plainly has "suffered an 'injury in fact,'" and he enjoys a "'close relationship'" with his father. *See id.* at 473 (Breyer, J., dissenting). *See also id.* at 447 (O'Connor, J., concurring) (finding no standing but noting "it seems clear that petitioner has a significant stake in challenging the statute and a close relationship with her father"). Further, there is even more of a hindrance than existed in *Miller*.

In *Miller*, the Petitioner and her father filed a complaint in federal court "seeking a judgment declaring that petitioner is a citizen of the United States and that she therefore has the right to possess an American passport." *Id.* at 426. Upon the government's motion, however, the father was dismissed from the case and he never appealed. *Id.* at 448. Justice O'Connor concluded that the father did not demonstrate "a hindrance." *Id.* Instead, "because he failed to appeal the erroneous dismissal of his claim, any hindrance to the vindication of Charlie Miller's constitutional rights is ultimately self imposed." *Id.*

The hindrance here was not self-imposed. Petitioner's father had no basis to interject in the government-initiated criminal prosecution against his son. *See Powers*, 499 U.S. at 414 (noting that potential jurors "are not parties" to the proceeding and "have no opportunity to be heard at the time of

their exclusion"). Petitioner's father was even precluded from testifying at trial. J.A. 123. Because Petitioner's father was procedurally barred from being an actual party, and was denied even the opportunity to participate as a witness, the third-party right holder "did not simply decline to bring the claim on his own behalf, but could not do so." *Miller*, 523 U.S. at 450.[24]

Moreover, the Court has been especially "forgiving" when a criminal defendant challenges a conviction by raising the rights of third parties. *See Powers*, 499 U.S. at 411 ("These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties.") (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *McGowan v. Maryland*, 366 U.S. 420 (1961)). *See also Griswold*, 381 U.S. at 481 ("Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime."). Indeed, permitting third-party standing is particularly appropriate in circumstances – such as those presented here – where the right holder is not subject to

---

[24] Even the concurring opinion would allow standing to raise a claim under rational basis scrutiny. *See id.* at 451 ("Given that petitioner cannot raise a claim of discrimination triggering heightened scrutiny, she can argue only that § 1409 irrationally discriminates between illegitimate children of citizen fathers and citizen mothers.") (O'Connor, J., concurring).

prosecution. *See Baird*, 405 U.S. at 446 ("the case for according standing to assert third-party rights is stronger . . . [when the right holders] are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.").

Finally, a denial of standing would raise serious questions of fairness. Petitioner did not choose to initiate the instant litigation; he is an unwilling participant. The government chose to charge him with a serious crime, a felony, an element of which is that he must be an alien. *Smith-Baltiher*, 424 F.3d at 921. Having charged Petitioner with such an offense, invoking the jurisdiction of the courts to try and imprison him, the Solicitor General should not be heard to argue that Petitioner lacks standing to pursue the issues intimately connected with his defense. Because of the government's actions, "petitioner is the 'least awkward challenger,' since it is [his] right to citizenship [and freedom] that is at stake." *Miller*, 523 U.S. at 454 n.1 (Scalia, J., concurring) (quoting *Craig*, 429 U.S. at 197).

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

REUBEN CAMPER CAHN
STEVEN F. HUBACHEK*
ELIZABETH M. BARROS
VINCENT J. BRUNKOW
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California
92101-5008
Telephone: (619) 234-8467
Steven_Hubachek@fd.org

Counsel of Record

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

2. Nationality Act of 1940, ch. 876, § 201, Title I, ch. 2, 54 Stat. 1138-1139:

> SEC. 201. The following shall be nationals and citizens of the United States at birth:
>
> (a) A person born in the United States, and subject to the jurisdiction thereof;
>
> (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;
>
> (c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;
>
> (d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the

Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

3. Nationality Act of 1940, ch. 876, § 205, Title I, ch. 2, 54 Stat. 1139-1140:

The provisions of section 201, subsections (c), (d), (e), and (g), and: section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

4. Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 301(a)(7), 66 Stat. 235-236 (1952):

SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:

. . .

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

5. Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 309(c), 66 Stat. 238-239 (1952):

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United

States or one of its outlying possessions for a continuous period of one year.

6. Immigration and Nationality Act, as amended Nov. 14, 1986, Pub.L. 99-653, § 12, 100 Stat. 3657; 8 U.S.C. § 1401(g):

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

RESPONDENT'S BRIEF

No. 09-5801

In the Supreme Court of the United States

RUBEN FLORES-VILLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
LANNY A. BREUER
Assistant Attorneys General

EDWIN S. KNEEDLER
Deputy Solicitor General

SARAH E. HARRINGTON
Assistant to the Solicitor General

DONALD E. KEENER
CAROL FEDERIGHI
ROBERT N. MARKLE
WILLIAM C. BROWN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In order for a United States citizen who has a child abroad with a non-United States citizen to transmit his or her citizenship to the foreign-born child, the U.S. citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. The question presented is:

Whether Congress's decision to impose a shorter physical-presence requirement on unwed citizen mothers of foreign-born children than on other parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1970) violates the Fifth Amendment's guarantee of equal protection.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 7
Argument:
I. Petitioner lacks standing to assert the equal protection rights of his father 10
II. The rules established by Sections 1401 and 1409 for conferral of citizenship on a child born abroad out of wedlock are fully consistent with the Constitution 14
A. Congressional enactments governing immigration and naturalization are subject to a deferential standard of review 15
B. Congress may apply a physical-presence requirement to U.S. citizen parents of foreign born children 20
C. Congress constitutionally may apply a shorter physical presence requirement to unmarried U.S. citizen mothers of foreign born children than to all other U.S. citizen parents of foreign born children 22
1. Reducing the risk of statelessness is an important governmental objective supporting the shorter physical-presence requirement in Section 1409(c) 23
2. The physical presence requirement in Section 1409(c) is substantially related to the important government objective of reducing statelessness 30

Table of Contents —Continued: Page

a. Unwed U.S. citizen mothers and fathers are not similarly situated with respect to the risk that their foreign-born child will be stateless at birth 31
b. The statutory framework is not premised on stereotypes about mothers and fathers 39
c. Congress can constitutionally address an aspect of the problem of statelessness without eliminating the problem in its entirety 40
III. Even if the distinctions Congress drew in Sections 1401 and 1409 were found to be unconstitutional, petitioner would not be entitled to relief 45
Conclusion 53

TABLE OF AUTHORITIES

Cases:

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 24, 48
Barrows v. *Jackson*, 346 U.S. 249 (1953) 14
Califano v. *Westcott*, 443 U.S. 76 (1979) 46
Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 11, 14
Craig v. *Boren*, 429 U.S. 190 (1976) 14
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 17
Fiallo v. *Bell*, 430 U.S. 787 (1977) 18, 19, 20, 38, 41
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 17
Galvan v. *Press*, 347 U.S. 522 (1954) 18
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 18
Heckler v. *Mathews*, 465 U.S. 728 (1984) 46, 51

Cases—Continued: Page

INS v. *Pangilinan*, 486 U.S. 875 (1988) 47
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) 24
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 18
Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 14
Lehr v. *Robertson*, 463 U.S. 248 (1983) 13, 32, 34
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) .....
Mathews v. *Diaz*, 426 U.S. 67 (1976) 18
McGowan v. *Maryland*, 366 U.S. 420 (1961) 11
Miller v. *Albright*, 523 U.S. 420 (1998) ..... *passim*
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 23
Nguyen v. *INS*, 533 U.S. 53 (2001) ..... *passim*
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909) 18
Parham v. *Hughes*, 441 U.S. 347, 355 (1979) 32
Pina v. *Mukasey*, 542 F.3d 5 (1st Cir. 2008) 44
Plyler v. *Doe*, 457 U.S. 202 (1982) 18
Powers v. *Ohio*, 499 U.S. 400 (1991) 11, 12, 14
Rogers v. *Bellei*, 401 U.S. 815 (1971) 16, 21, 23, 26, 49
Runnett v. *Shultz*, 901 F.2d 782 (9th Cir. 1990) 7
Secretary of State v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) 11, 12
Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 23, 31, 40
Schneiderman v. *United States*, 320 U.S. 118 (1943) 16
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 18
Singleton v. *Wulff*, 428 U.S. 106 (1976) 11, 14
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 46

Cases—Continued: Page

Spencer v. Kemna, 523 U.S. 1 (1998) 5
The Chinese Exclusion Case, 130 U.S. 581 (1889) 17
Trop v. *Dulles*, 356 U.S. 86 (1958) 24, 34
United States v. *Cervantes-Nava*, 281 F.3d 501 (6th Cir.), cert. denied, 536 U.S. 914 (2002) 45
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 18
United States v. *Ginsberg*, 243 U.S. 472 (1917) 47
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 17
United States v. *Virginia*, 518 U.S. 515 (1996) 23
United States v. *Wong Kim Ark*, 169 U.S. 649 (1898) 15, 16, 25
Wurth v. *Seldin*, 422 U.S. 490 (1975) 11
Weedin v. *Chin Bow*, 274 U.S. 657 (1927) 21, 34
Welsh v. *United States*, 398 U.S. 333 (1970) 46

Constitutions, statutes and regulations:

U.S. Const.:
Art. I 7
§ 8, Cl. 4 ..... 2, 16
Naturalization Clause 17
Amend. V 12, 13, 30
Due Process Clause 6
Amend. XIV 15, 16, 28, 31
Constitución Política de la República de Costa Rica de 1949, with amendments through 2003, tit. II 35

Constitution, statutes and regulations—Continued: Page

Constitución Política de los Estados Unidos Mexicanos, as amended, Art. 30, Diario Oficial de la Federación, 5 de Febrero de 1917 (Mex.) 33

Act of Mar. 26, 1790, ch. 3, 1 Stat. 104 25

Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 26

Administrative Procedure Act, 5 U.S.C. 704 .....

Child Citizenship Act of 2000, Pub. L. No. 106 395, § 102(a), 114 Stat. 1631 43

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2

8 U.S.C. 1101(23) 19

8 U.S.C. 1325 4

8 U.S.C. 1326 5

8 U.S.C. 1326(a) 4

8 U.S.C. 1326(b) 4

8 U.S.C. 1401 (1970) ..... *passim*

8 U.S.C. 1401(a)(7) (1970) 2, 5, 6, 15, 51

8 U.S.C. 1401(g) 2, 27

8 U.S.C. 1401(h) 26

8 U.S.C. 1409 (1970) ..... *passim*

8 U.S.C. 1409 ..... 6, 44

8 U.S.C. 1409(a) (1970) 3, 15, 45, 47, 49, 52

8 U.S.C. 1409(a) 3, 33, 38

8 U.S.C. 1409(c) ..... *passim*

8 U.S.C. 1423 44

8 U.S.C. 1427 44

8 U.S.C. 1445(b) 44

Statutes and regulations—Continued: Page

8 U.S.C. 1431 44
8 U.S.C. 1431(a) 44
8 U.S.C. 1433 (1970) (§ 322) 12, 43
8 U.S.C. 1433(a) (1970) 43
8 U.S.C. 1433(a) 44
8 U.S.C. 1452(a) 5
8 U.S.C. 1503 ..... 12, 13
Immigration and Nationality Act, ch. 477, 66 Stat. 163:
§ 309(c), 66 Stat. 239 30
§ 406, 66 Stat. 281 46
Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655:
§ 12, 100 Stat. 3657 2
§ 13(b), 100 Stat. 3657 3
Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305:
§ 101(a)(2), 108 Stat. 4306 26
§ 102(a), 108 Stat. 4306 43
Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618 2
Nationality Act of 1940, chap. 876, 54 Stat. 1137:
§ 201, 54 Stat. 1138 27
§ 201(g), 54 Stat. 1139 27
§ 205, 54 Stat. 1139 ..... 27, 28
§ 315, 54 Stat. 1146 43
21 U.S.C. 952 (1994) 4
21 U.S.C. 960 (1994) 4

Statutes and regulation—Continued: Page

Staatsbürgerschaftsgesetz 1985 [Federal Law on Austrian Nationality 1985] Bundegesetzblatt [BGBl] No. 311/1985, as amended by Staatsbürgerschaftsrechts Novelle 2005 BGBl I No. 37/2006 (Austria):

Art. 7(3) 37

Art. 7a 37

Nationality Law (promulgated by the Standing Comm. of the Nat'l People's Congress, Sept. 10, 1980, effective Sept. 10, 1980) 1 P.R.C. Laws (1979-1982) 182 (1987) 35

Art. 3 35

Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, Reichsgesetzblatt [RGBl.] 583, as last amended by Gesetz, Feb. 5, 2009, Bundesgesetzblatt [BGBl.] I at 1970 (F.R.G.) 35

§ 4 37

Nationality Law 26 of 2006 (Iraq), Art. 3 36

Kokuseki hō [Nationality Law], Law No. 147 of 1950, last amended by Law No. 88 of 2008 (Japan):

Art. 2 36

Art. 3 36

Jordanian Nationality Law No. 6 of 1954:

Art. 3(4) 36

Art. 17 36

Statutes and regulation—Continued: Page

Loi 1.155 relative à la Nationalité modifiée par la loi 1.276 du 22 décembre 2003 [Law 1.155 of December 18, 1992 on Nationality as amended by Law 1.276 of December 2003], Codes et Lois de la Principauté de Monaco, I Lois, Règlements, Arrêtés, Heading 11.21 (Editions du Juriselasseur) 35

Rijkswet op het Nederlanderschap [Kingdom Act on Netherlands Nationality] Stb. 1984, p. 628:

Art. 4 37

Art. 16 36

Lov nr. 51/2005 om norsk statsborgerskap [Act No. 51/2005 on Norwegian Citizenship], as amended by Act No. 36 of 30 June 2006, chap. 2, § 4 37

Lege Nr. 21 din 1 martie 1991, Legea cet enici române [Law No. 21 of Mar. 1, 1991, as amended through May 17, 2009] [Nationality Act] (Rom.) 35, 37

Guo Ji Fa [Nationality Act] (promulgated Feb. 5, 1929, last amended Jan. 27, 2006), Yue Dan Jian Ming Liu Fa I 105 (2009) (Taiwan), art. 11 36

Turkish Citizenship Law, Law No. 5901/2009 37

British Nationality Act 1981, § 50(9A) (U.K.) 37

British Nationality, Immigration and Asylum Act 2002, § 9 (U.K.) 37

8 C.F.R. 341.1 12

British Nationality (Proof of Paternity) Regulations 2006 37

Miscellaneous: Page

138 Cong. Rec. 33,469 (1992) 49

H.R. 801, 106th Cong., 1st Sess. (2007) 49

H.R. 1380, 101st Cong., 1st Sess. (1989) 49

H.R. Rep. No. 852, 106th Cong., 2d Sess. (2000) 44

Kay Hailbronner, EUDO Citizenship Observatory, *Country Report: Germany* (rev. Apr. 2010) 37

Immigratie-en Naturalisatiedienst (Netherlands Immigration and Naturalisation Service) 37

Naturalization and Nationality Amendments and Parole for Funerals: Hearing before the Subcomm. on Int'l Law, Immigration & Refugees of the House Comm. on the Judiciary, 103d Cong., 1st Sess. (1993) 49

32 Op. Att'y Gen 162 (1920) 26

39 Op. Att'y Gen 290 (1939) 26, 28

39 Op. Att'y Gen 556 (1937) 26, 28

Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization, 73d Cong., 1st Sess. (1933) 29

Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on H.R. 783 and H.R. 97 before the Subcomms. on the Judiciary, 82d Cong., 1st Sess. (1951) 49

S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 30

Miscellaneous—Continued:

Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935) 28, 32

Catheryn Seckler Hudson, *Statelessness: With Special Reference to the United States* (1934) 39

2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1966) 17

To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. (printed 1945) ..... *passim*

U.N. High Comm'r for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection* (2008), http://www.unhcr.org/49c271752.html 24

United States Dep't of State, *Form DS 2029, Application for a Consular Report of Birth* (Jan. 2010), http://www.state.gov/documents/organization/83127.pdf 24

Frederick Van Dyne, *Citizenship of the United States* (1904) 25

In the Supreme Court of the United States

No. 09-5801

RUBEN FLORES-VILLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 169-186) is reported at 536 F.3d 990. The order of the district court granting the government's motion in limine (J.A. 135-146) is reported at 497 F. Supp. 2d 1160.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2008. A petition for rehearing was denied on May 5, 2009 (J.A. 187). The petition for a writ of certiorari was filed on August 3, 2009, and was granted on March 22, 2010. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set out in an appendix to petitioner's brief.

STATEMENT

1. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has elected to confer United States citizenship by statute on certain persons born outside the United States through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* At the time of petitioner's birth in 1974, a child born outside the United States to married parents, only one of whom was a U.S. citizen, could acquire citizenship through his or her U.S. citizen parent if, before the child's birth, the citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned fourteen years of age. 8 U.S.C. 1401(a)(7) (1970).[1] The same physical-presence requirement applied if the child was born out of wedlock and the father was a U.S. citizen

---

[1] Section 1401 has since been amended, with former Section 1401(a)(7) redesignated as Section 1401(g) and the term of the required physical presence in the United States reduced to a total of five years, two of which must be after the parent turned fourteen. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. That amendment does not apply unless the child was born on or after November 14, 1986, however, and thus does not govern petitioner's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618. Unless otherwise specifically stated, references herein to Section 1401 or Section 1401(a)(7) are to the 1970 version.

(and if the paternity was established through legitimation while the child was under age 21). 8 U.S.C. 1409(a) (1970); see *Nguyen* v. *INS*, 533 U.S. 53, 59-73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18).[2] If, however, the child was born out of wedlock outside the United States and only his mother was a U.S. citizen, Section 1409(c) transmits U.S. citizenship to the child if the mother was a citizen of the United States at the time of the child's birth and had been physically present in the United States before the child's birth for a continuous period of at least one year. *Id.* at 59-60.

2. In 1974, petitioner was born in Tijuana, Mexico, to unmarried parents. J.A. 85, 91-93. His mother is a citizen and national of Mexico, and his father, who was 16 years old at the time of petitioner's birth, is a U.S. citizen who resided in the United States for much of his life. J.A. 84, 92. Although petitioner's father was a U.S. citizen from birth, petitioner's father did not obtain formal documentation of that fact until May 24, 1999 (almost 25 years after petitioner was born), when he was issued a certificate of citizenship upon his own application. J.A. 84. Petitioner's father was confirmed as a citizen from birth based on the fact that his mother—petitioner's paternal grandmother—was a U.S. citizen by birth in the United States, and met the requirements of Section 1409(c) to transmit citizenship to her out-of-wedlock child (petitioner's father) at the time of his

---

[2] Section 1409(a) was amended in 1986 to revise the requirements that must be satisfied for a child born abroad out of wedlock to obtain citizenship through a United States citizen father. 1986 Act, Pub. L. No. 99-653, § 13(b), 100 Stat. 3657; *Miller* v. *Albright*, 523 U.S. 420, 468 (1998) (Ginsburg, J., dissenting).

birth. J.A. 8, 88, 170. It is not clear that petitioner's father was aware of his U.S. citizenship prior to adulthood.

When petitioner was two months old, his father and paternal grandmother brought him to the United States to receive medical treatment. J.A. 85-86, 90, 94-96. After petitioner was released from the hospital, he lived with his father and grandmother in the San Diego area, where he grew up. J.A. 86, 90. Although petitioner's father is not listed on his birth certificate, J.A. 92, in 1985 the father acknowledged petitioner as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico, J.A. 98-100.

On March 17, 1997, petitioner was convicted of importation of marijuana, in violation of 21 U.S.C. 952 and 960 (1994), and was sentenced to 24 months of imprisonment. J.A. 171. After serving his sentence, petitioner was ordered removed from the United States, and he was removed on October 16, 1998. *Ibid.* Petitioner repeatedly returned to the United States following removal, resulting in additional removal proceedings in 1999 (when he was twice deported) and again in 2002. *Ibid.* In June 2003, following another illegal reentry, petitioner was convicted of two counts of illegal entry into the United States in violation of 8 U.S.C. 1325, and was again removed in October 2003. *Ibid.* Petitioner again reentered the United States illegally and was once again removed in March 2005, after which he yet again unlawfully returned to the United States. J.A. 148-150, 171.

3. On February 24, 2006, petitioner was arrested and charged with being a deported alien found in the United States after deportation, in violation of 8 U.S.C. 1326(a) and (b). J.A. 5-6, 149-150, 171. Petitioner

sought to defend against the charge by establishing that he had acquired U.S. citizenship at birth through his father. J.A. 171. After his indictment, petitioner filed an application for a certificate of citizenship with the Department of Homeland Security (DHS), pursuant to 8 U.S.C. 1452(a). J.A. 65-80. DHS denied petitioner's application (and his administrative appeal) because it was physically impossible for petitioner's father, who was 16 years old when petitioner was born, to have been present in the United States for five years after his fourteenth birthday, but prior to petitioner's birth, as required by former Section 1401(a)(7) in order for him to transmit U.S. citizenship to petitioner. J.A. 61-63, 126-134.

The government filed a motion in limine in petitioner's illegal-reentry prosecution to exclude evidence of petitioner's purported citizenship because petitioner did not qualify for citizenship under the INA. J.A. 7-23. The district court granted the motion after concluding that no reasonable juror could find that petitioner's father satisfied the transmission of citizenship requirements of the INA. J.A. 135-146. The district court also rejected petitioner's equal protection challenge to application of the physical-presence requirements to his father. J.A. 143-146. Following a bench trial on stipulated facts, petitioner was convicted of violating 8 U.S.C. 1326 by illegally entering the United States without permission after having been removed. He was sentenced to 42 months of imprisonment.[3] J.A. 158-160.

---

[3] Petitioner has since served his sentence and been released under supervision and then deported. The completion of petitioner's sentence and his deportation do not, however, render the present proceeding moot. *See Spencer v. Kemna*, 523 U.S. 1, 8, 12 (1998).

4. On appeal, petitioner reasserted his contention that the versions of Sections 1401(a)(7) and 1409 applicable at the time of his birth violated the equal protection component of the Fifth Amendment's Due Process Clause because they required a U.S. citizen father of a child born abroad out of wedlock to have been physically present in the United States for a total of at least five years following his fourteenth birthday in order to transmit his citizenship to his child, while a U.S. citizen mother in such a situation need only have been physically present in the United States for a continuous period of one year. J.A. 169-170, 180-182. The court of appeals rejected petitioner's contention and affirmed his conviction. J.A. 169-186. The court concluded that the answer to petitioner's equal protection argument "follows from the Supreme Court's opinion in *Nguyen* v. *INS*." J.A. 170. In *Nguyen*, *supra*, this Court held that Section 1409 does not discriminate on the basis of gender in violation of equal protection principles by requiring a citizen father—but not a citizen mother—to take steps to establish his connection (through legitimation, adjudication, or acknowledgment) to a child born out of wedlock outside the United States before he can transmit U.S. citizenship to the child. J.A. 174-175.

Assuming that intermediate scrutiny applies to petitioner's equal protection challenge, the court of appeals determined that, "[a]lthough the means at issue are different in this case—an additional residence requirement for the unwed citizen father—the government's interests are no less important, and the particular means no less substantially related to those objectives, than in *Nguyen*." J.A. 175-176 & n.2. The court reasoned that applying different physical-presence requirements to unwed citizen mothers and fathers was substantially re-

lated to the important government interests in minimizing the risk of statelessness of foreign-born children and in "assuring a link between an unwed citizen father, and this country, to" the child. J.A. 176-177. The court relied on its analysis in *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990), in which it observed that "illegitimate children are more likely to be 'stateless' at birth" because "if the U.S. citizen mother is not a dual national, and the illegitimate child is born in a country that does not recognize citizenship by *jus soli* (citizenship determined by place of birth), the child can acquire no citizenship other than his mother's at birth." J.A. 176 (quoting *Runnett*, 901 F.2d at 787). The court found that concern about statelessness justified a shorter physical-presence requirement for mothers of out-of-wedlock children to "insure that the child will have a nationality at birth." J.A. 176, 179. The Court acknowledged that the "fit" between the means and the objectives was "not perfect," but found it "sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship." J.A. 177.[4]

SUMMARY OF ARGUMENT

Pursuant to its authority under Article I of the Constitution, Congress has enacted comprehensive rules governing immigration and naturalization. One subset of those rules governs the acquisition of citizenship by children born abroad to U.S. citizen parents. When a U.S. citizen has a child abroad with a non-citizen, Congress requires that the U.S. citizen parent have satisfied a physical-presence requirement prior to the child's birth before the parent may transmit his or her citizen-

---

[4] The court of appeals also rejected petitioner's other constitutional and statutory arguments. See U.S. Br. in Opp. at 8 n.5; J.A. 180-185.

ship to the child as of birth. That requirement applies to married fathers and married mothers—and it applies to unmarried fathers such as petitioner's. In an effort to reduce the number of children who may be born stateless, Congress has applied a shorter physical-presence requirement to unmarried U.S. citizen mothers who give birth abroad. Such physical-presence requirements on the U.S. citizen parents of children born abroad ensure that foreign-born children will have sufficient connections to the United States to merit citizenship, and this Court has long upheld Congress's decision to require such a connection.

Petitioner asserts an equal protection challenge to this statutory framework on behalf of his father. But petitioner's father has never asserted such a claim on his own behalf, and petitioner cannot demonstrate any hindrance to his father's having done so. Petitioner therefore lacks third-party standing to assert his father's equal protection claim.

Congress's choice of rules governing naturalization is entitled to deference by this Court and is subject to review under rational basis standards. But even if heightened review is applied to the equal protection challenge asserted here on behalf of petitioner's father, the statutory provisions are constitutional. There is no serious dispute that reducing the number of children born stateless is an important government objective. Congress chose to pursue that objective by applying a shorter physical-presence requirement to unwed U.S. citizen mothers of foreign-born children than to other U.S. citizen parents. That statutory scheme is constitutionally permissible because it is substantially related to the government's important interest.

As Congress knew, most countries apply *jus sanguinis* citizenship laws, pursuant to which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. In most of those countries—as indeed in most *jus soli* countries such as the United States—the only parental relationship that is legally recognized or formalized at birth for a child born out of wedlock is usually that of his mother. Thus, at birth, the child's only means of taking citizenship is through his mother. Although such a child's father may subsequently take actions to establish a legally recognized parental relationship, there is no guarantee that he will ever do so. Because impediments to an unwed mother's ability to transmit her citizenship to a child at birth create a substantially higher risk that a child will be born stateless, Congress eased the requirements for acquisition of U.S. citizenship by the children of those mothers.

The fact that Congress did not eliminate the possibility that any foreign-born child of a U.S. citizen parent would be stateless, either at birth or at some point later in his life, does not render its chosen framework unconstitutional. No foreign-born person has a free-standing constitutional right to U.S. citizenship, and no U.S. citizen has a free-standing right to transmit his or her citizenship to a foreign-born child. Congress balances competing interests in enacting laws governing naturalization. The carefully measured rules Congress enacted serve the important governmental interest in ensuring that children born abroad have sufficient ties to this country to merit citizenship and the interest in reducing statelessness—and consequently do not violate equal protection.

Even if this Court were to determine that the differing physical-presence requirements in Sections 1401 and 1409 violated equal protection, petitioner is not entitled to the relief he seeks, namely a reversal of his criminal conviction based on a determination that he has been a citizen from birth. The fact that Congress chose to apply the more stringent physical-presence requirements in Section 1401 to a substantial majority of U.S. citizen parents of foreign-born children, the need to preserve necessary flexibility for Congress, as well as adherence to this Court's longstanding treatment of naturalization requirements lead to the conclusion that the proper way to cure any equal protection violation would be to apply the longer physical-presence requirements in Section 1401, on a prospective basis, to unwed citizen mothers. Petitioner's suggestions that the Court either extend the shorter physical-presence requirement in Section 1409(c) to unmarried fathers (but not to married parents of either gender) or retain the unequal treatment but reduce the length of the physical-presence requirement applicable to unmarried men make little sense and could foreclose future revision by Congress. Equalizing the treatment of all citizen parents of foreign-born children as suggested here would eliminate any equal protection problem and most faithfully preserve Congress's policy choices.

ARGUMENT

I. PETITIONER LACKS STANDING TO ASSERT THE EQUAL PROTECTION RIGHTS OF HIS FATHER

Petitioner has not suffered any differential treatment by virtue of his own gender. Petitioner's equal protection complaint instead is that his father is treated less favorably than a U.S. citizen mother with respect to

the ability to transmit U.S. citizenship to a child born abroad out of wedlock. That claim is properly raised by petitioner's father, who is the subject of the allegedly unconstitutional differential treatment.

This Court has held that a party ordinarily "cannot rest his claim to relief on the legal rights or interests of third parties." *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (*Munson*) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). In such a case, a litigant may not assert the constitutional rights of an absent third party unless the litigant has a "close relation" to the party whose rights are asserted, and there is "some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991); see also, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 445-451 (1998) (O'Connor, J., concurring in the judgment); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623-624 n.3 (1989) (*Caplin & Drysdale*); *Singleton* v. *Wulff*, 428 U.S. 106, 113-116 (1976) (opinion of Blackmun, J.); *Warth*, 422 U.S. at 499-500; *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). Those restrictions "arise[] from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" *Miller*, 523 U.S. at 446 (O'Connor, J., concurring in the judgment) (quoting *Wulff*, 428 U.S. at 113-114 (opinion of Blackmun, J.)).

Although we may assume that petitioner has a close relationship with his father, petitioner cannot satisfy this Court's limits on *jus tertii* standing because, as the court of appeals found (J.A. 182), "the record discloses no obstacle that would prevent [petitioner's father] from asserting his own constitutional rights." See *Powers*,

499 U.S. at 411; see also *Singleton*, 428 U.S. at 116 (opinion of Blackmun, J.). It is true that petitioner's father is not entitled to intervene in petitioner's criminal case in order to assert his equal protection challenge; but the inquiry is not whether a third party may assert his own rights in this particular case, but whether he may effectively assert them at all. Petitioner has not demonstrated any "daunting" or "considerable practical" barriers—or indeed, any barriers at all—to his father's protection of his own rights if he chose to do so. See *Powers*, 499 U.S. at 414-415; see also *Munson*, 467 U.S. at 956.

Shortly after petitioner's birth in 1974, his father brought him to the United States to receive medical care. J.A. 135 136. After his release from the hospital, petitioner lived with his father and paternal grandmother near San Diego. J.A. 136. Although petitioner's father formally acknowledged his paternity in 1985 in Mexico, *ibid.*, he took no steps to have petitioner declared a U.S. citizen. Petitioner's father did not, for example, apply for a certificate of citizenship on behalf of petitioner when petitioner was a minor. See 8 C.F.R. 341.1. If that application was turned down, petitioner's father could have brought an action on petitioner's behalf challenging that denial under 8 U.S.C. 1503, and raising the claim that his inability to transmit citizenship to petitioner violated his Fifth Amendment rights. Nor did petitioner's father ever apply to have petitioner naturalized when petitioner was a child. See, *e.g.*, 8 U.S.C. 1433 (1970); cf. J.A. at 7, *Miller*, *supra* (No. 96-1060) (First Amended Complaint); *Miller*, 523 U.S. at 426 (father initially filed suit with foreign-born child seeking such a declaration).

Petitioner offers no justification for his father's failure to assert his equal protection claim by bringing his own action. It is true that petitioner's father did not himself obtain a certificate of citizenship until 1999, J.A. 84, when petitioner was already 24 years old. But petitioner's father was automatically a citizen at birth by virtue of his mother's citizenship, and his ignorance of that fact does not constitute the type of hindrance to assertion of his own rights that would confer on petitioner third-party standing to raise those rights. See *Lehr* v. *Robertson*, 463 U.S. 248, 264 (1983).

Moreover, once petitioner became an adult, petitioner's father could have joined an equal protection claim a later suit by petitioner himself under 8 U.S.C. 1503, following a denial of an application by petitioner for such a certificate. See also *Nguyen*, 533 U.S. at 58 (father asserted claim under the Fifth Amendment by participating in child's petition for judicial review of removal order). Petitioner is correct (Br. 63) that a majority of the Court in *Miller* found that the petitioner in that case had third-party standing to assert her citizen father's equal protection rights. But that finding in *Miller* was based on the existence of an actual hindrance to the citizen father's demonstrated efforts to pursue his equal protection claim. In *Miller*, the petitioner and her father had together sought a declaration that the father's inability to transmit citizenship to his foreign-born daughter violated the Fifth Amendment. 523 U.S. at 426. At the government's urging, the district court had dismissed the petitioner's father from the suit and the father had failed to appeal that ruling. See *id.* at 473-474 (Breyer, J., dissenting). The Court concluded that, under those circumstances, the right-holder (the petitioner's father) faced a sufficient barrier to the ac-

tual assertion of his rights to confer third-party standing on his daughter. *Id.* at 432-433 (Stevens, J.); *id.* at 454 n.1 (Scalia, J., concurring); *id.* at 473-475 (Breyer, J., dissenting).

That holding does not apply to petitioner in this case, however, because two crucial elements are missing: (1) unlike petitioner's father, the father in *Miller* had in fact taken steps to attempt to assert his equal protection rights; and (2) the father in *Miller* was prevented through dismissal from the suit from pursuing vindication of his rights, while no obstacle prevented petitioner's father from pursuing those rights in the proper manner. "Here, although we have an injured party before us, the party actually discriminated against is both best suited to challenging the statute and available to undertake that task." *Miller*, 523 U.S. at 450 (O'Connor, J., concurring). Petitioner has failed to demonstrate that his father is unable "to advance his own rights," *Caplin & Drysdale*, 491 U.S. at 624 n.3, because of a "genuine obstacle" that rises to the level of a hindrance, *Singleton*, 428 U.S. at 116. Cf. *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004); *Powers*, 499 U.S. at 411; *Craig* v. *Boren*, 429 U.S. 190, 196-197 (1976); *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953).

II. THE RULES ESTABLISHED BY SECTIONS 1401 AND 1409 FOR CONFERRAL OF CITIZENSHIP ON A CHILD BORN ABROAD OUT OF WEDLOCK ARE FULLY CONSISTENT WITH THE CONSTITUTION

If the Court concludes, contrary to our submission in Point I, that petitioner may assert the rights of his father to challenge the physical-presence requirements in Sections 1401 and 1409, the Court should reject that challenge.

At the time of petitioner's birth, the general rule was that a child born abroad to one U.S. citizen parent and one non-U.S. citizen parent became a citizen at birth only if the citizen parent had been physically present in the United States for a minimum of ten years, at least five of which were after attaining the age of 14. 8 U.S.C. 1401(a)(7). That rule applied both to children of married parents regardless of which parent was a U.S. citizen and to children born out of wedlock if the father was a U.S. citizen at the time of the child's birth and subsequently established his paternity while the child was a minor. 8 U.S.C. 1401(a)(7), 1409(a). The physical-presence requirement applicable to petitioner's father in 1974 was a constitutionally permissible exercise of Congress's plenary authority over naturalization. Congress's enactments in the area of immigration and naturalization are entitled to great deference by the courts. Indeed, even under the heightened review accorded to congressional classifications in the domestic context, the different physical-presence requirements in Sections 1401 and 1409 are constitutional.

A. Congressional Enactments Governing Immigration And Naturalization Are Subject To A Deferential Standard Of Review

1. As this Court has long held, the Fourteenth Amendment to the Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Although "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, * * * [a] person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty

* * * or by authority of Congress." *Id.* at 702-703. There is no dispute in this case that petitioner was born outside the United States and is therefore not entitled —as a constitutional matter—to citizenship by virtue of his birth. Instead, he asserts a right to the "acquisition of citizenship by being born abroad of an American parent," which is "obviously" not governed by the Fourteenth Amendment. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971); see *Wong Kim Ark*, 169 U.S. at 688.

Article I of the Constitution vests in Congress the authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; *Wong Kim Ark*, 169 U.S. at 688. Authority over naturalization is thus "vested exclusively in Congress" by the Constitution. *Id.* at 701. That authority of course encompasses the power to grant citizenship to children who are born abroad of U.S. citizen parents. But "the Court has specifically recognized the power of Congress *not* to grant a United States citizen the right to transmit citizenship by descent." *Bellei*, 401 U.S. at 830 (emphasis added); *id.* at 831. Like any individual who seeks citizenship through naturalization, petitioner is bound by the rules set forth by Congress, see *id.* at 828 (noting that "naturalization by descent" is "dependent * * * upon statutory enactment"), and such citizenship is available "only upon terms and conditions specified by Congress," *Schneiderman* v. *United States*, 320 U.S. 118, 172 (1943) (Stone, C.J., dissenting).

The Judiciary has a crucial role in protecting rights accorded under the Constitution to citizens and to those aliens who have been allowed to become legal residents of this country, but it has not been thought to be the province of the Judiciary to determine which foreign-born persons should be permitted to become members

of our society in the first place. Nor are the courts well-positioned to second-guess Congress's judgments about what classes of persons should be eligible for statutory citizenship, for at least three reasons.

First, the Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893); see 2 *The Records of the Federal Convention of 1787* at 238 (Max Farrand ed., 1966) (remarks of Gouverneur Morris) ("[E]very Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted."). Deciding who should be admitted to citizenship involves fundamental questions of who should be entitled to share in the benefits, protections, and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990); *Dames & Moore* v. *Regan*, 453 U.S. 654, 663-665, 676-679 (1981). That determination requires a complex weighing of competing considerations, including the presence or likelihood of ties to the United States, moral and equitable factors, the laws of other nations on the subject, and the potential for dual citizenship or statelessness.

Second, the power to confer or deny citizenship to individuals born abroad—individuals who are aliens insofar as the Constitution is concerned—is also an aspect of the power to exclude aliens from the Nation. That power "is an incident of every independent nation." *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign at-

tribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

Third, the United States' "policy toward aliens" is "vitally and intricately interwoven with * * * the conduct of foreign relations," a power that likewise is vested in the political Branches. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

As this Court explained in *Plyler* v. *Doe*, 457 U.S. 202 (1982), drawing upon its powers under the Naturalization Clause and over foreign relations and attributes of inherent sovereignty, "Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. For the reasons discussed above, that principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 793 n.4 (1977) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); see also *id.* at 792 ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Accordingly, Congress's judg-

ments regarding the requirements that must be satisfied in order for a person born abroad to become a U.S. citizen are entitled to considerable deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Id.* at 791 (citation omitted).

2. Petitioner argues (Br. 15-17) that the deferential review normally accorded to Congress concerning immigration and naturalization does not apply to decisions regarding a foreign-born individual's acquisition of citizenship at birth. Petitioner is incorrect. The fact that Congress has enacted a law under which some foreign-born individuals acquire U.S. citizenship at birth by virtue of a parent's citizenship does not mean that such individuals are not naturalized citizens for purposes of the Constitution. As explained above, when Congress enacts rules to govern acquisition of citizenship, it acts pursuant to its constitutional authority to establish a uniform rule of naturalization. See *Miller*, 523 U.S. at 434 n.11 (opinion of Stevens, J.) ("Though petitioner claims to be a citizen from birth, * * * citizenship does not pass by descent. * * * Thus she must still meet the statutory requirements set by Congress for citizenship."); see also *id.* at 453 (Scalia, J., concurring in the judgment) ("Petitioner, having been born outside the territory of the United States, is an alien as far as the Constitution is concerned."); cf. *Nguyen*, 533 U.S. at 72 (acquisition of citizenship through an unmarried citizen father "is a naturalization," even though it "is retroactive to the date of birth").[6]

---

[6] The INA defines the term "naturalization" more narrowly as a statutory matter than this Court has construed the term as a constitutional matter. 8 U.S.C. 1101(a)(23); see *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality*

Petitioner's attempt (Br. 15) to distinguish *Fiallo* on the basis that it "[a]ddresses the [a]dmission of [a]liens, [n]ot [c]itizenship [b]y [b]irth," is also unavailing. In *Fiallo*, the Court rejected a constitutional challenge to an immigration preference that sought to reunite unwed mothers and their children, but did not afford a similar preference to unwed fathers and their children. 430 U.S. at 788-791. The plaintiffs in that case included U.S. citizens, *id.* at 790 n.3, who argued that a deferential standard of review should not apply because the statutory provision at issue "implicated 'the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship,'" *id.* at 794 (quoting Appellant's Br. at 54, *Fiallo*, *supra* (No. 75-6297)). The Court found "no reason to review the broad congressional policy choice at issue [t]here under a more exacting standard than" in prior cases applying deferential review to immigration laws, noting that the Court had previously "rejected the suggestion that more searching judicial scrutiny [of immigration statutes] is required" when the constitutional rights of citizens are implicated. *Id.* at 794-795.

B. Congress May Apply A Physical-Presence Requirement To U.S. Citizen Parents Of Foreign-Born Children

The physical presence requirement to which petitioner ascribes injury is a rule that applies not only to unmarried fathers, but also to married fathers and mothers. Petitioner argues (Br. 28, 34) that the "age-calibrated, 10-year residence requirement" applicable to

---

Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 413-414 (printed 1945) (noting that INA's definition of "naturalization" is "narrower" than the "broad[]" meaning of the term in the Constitution).

his father—and to most U.S. citizen parents of foreign-born children—unconstitutionally "disabl[es] a class of U.S. fathers * * * from transmitting citizenship to their legitimated children." There is nothing constitutionally suspect, however, about that physical-presence requirement in its own right. As petitioner concedes (Br. 29), "[t]he requirement of pre-birth residence vindicates a well-established Congressional goal of ensuring that citizenship not pass through generations of expatriate citizens living outside the United States for their entire lives." The validity of that goal, as well as the legitimacy of achieving it through physical-presence requirements, is well established in this Court's cases. As the Court recognized in *Nguyen*, Congress has a legitimate "desire to ensure some tie between this country and one who seeks citizenship." 533 U.S. at 68. One means Congress has employed to ensure that a sufficient tie exists between a foreign born individual and this country is the imposition of physical-presence requirements on the citizen parents of such children. Cf. *Weedin* v. *Chin Bow*, 274 U.S. 657, 665-667 (1927). This Court has thus "emphasized the importance of residence in this country as the talisman of dedicated attachment." *Bellei*, 401 U.S. at 834.[6]

---

[6] Prior to 1940, the governing statute required physical presence prior to the child's birth, but not of any particular length. When Congress first enacted a physical-presence requirement of a particular length in the 1940 code, it was concerned that individuals born and residing abroad will be "alien in all their characteristics and connections and interests," notwithstanding a biological connection to a U.S. citizen. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 37 (printed 1945).

C. Congress Constitutionally May Apply A Shorter Physical-Presence Requirement To Unmarried U.S. Citizen Mothers Of Foreign-Born Children Than To All Other U.S. Citizen Parents Of Foreign-Born Children

Although the general rule at the time of petitioner's birth was that a U.S. citizen parent (married or unmarried) had to satisfy a physical-presence requirement of 10 years prior to the birth of the child (5 of which had to be after the parent was 14 years old), Congress carved out an exception to that general rule by adopting a shorter physical-presence requirement for unwed citizen mothers of foreign-born children. That decision by Congress was constitutionally permissible. In *Nguyen*, this Court upheld Congress's decision to apply a set of conditions on the conferral of U.S. citizenship by U.S. citizen fathers of children born abroad out of wedlock, but not to the citizen mothers of such children. 533 U.S. at 60-73. In so holding, the Court concluded that the distinction satisfied the heightened equal protection review this Court applies to gender-based classifications in the domestic context, and therefore did not need to decide "whether some lesser degree of scrutiny pertains because [Section 1409] implicates Congress's immigration and naturalization power." *Id.* at 60-61; see also *id.* at 72-73 (the Court's holding rendered it unnecessary to assess the "implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power") (citing *Fiallo*, *Galvin*, and *Oceanic Steam Navigation Co.*).

For the reasons discussed above, Congress's choice of physical-presence requirements for U.S. citizen parents of foreign born children is entitled to rational basis review. That is particularly true in this case because, as

discussed below, unmarried mothers and unmarried fathers of foreign-born children are not similarly situated with respect to the interest (reduction of statelessness) Congress sought to advance. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). Just as in *Nguyen*, however, this Court need not decide what level of review is warranted because Congress's legislative classification serves "important governmental objectives" through means that are "substantially related to the achievement of those objectives" and that do not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)).

1. Reducing The Risk Of Statelessness Is An Important Governmental Objective Supporting The Shorter Physical-Presence Requirement In Section 1409(c)

a. In deciding to impose a shorter physical-presence requirement on unmarried citizen mothers of foreign-born children than on all other parents of such children, Congress sought to reduce the incidence of statelessness among children at the time of their birth. As this Court has noted, citizenship in the United States has always been principally governed by the rule of "*jus soli*, that is, that the place of birth governs citizenship status except as modified by statute." *Bellei*, 401 U.S. at 828. Many other nations, however, apply the civil-law rule of *jus sanguinis*, under which citizenship is acquired principally based upon a blood relationship with a parent. See authorities cited in *Miller*, 523 U.S. at 477 (Breyer,

J., dissenting).[7] The potential for statelessness arises when a child is born in a *jus sanguinis* country but is unable to obtain the nationality of either of his parents. This Court has declared the issue of statelessness to be "of the utmost import," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and has noted that statelessness is "deplored in the international community of democracies" and can have "disastrous consequences" for a stateless individual. *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958) (opinion of Warren, C.J.). See *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967) ("In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country."); see generally U.N. High Comm'r for Refugees, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection* iv (2008), http://www.unhcr.org/49a271752.html. Congress's goal of diminishing the incidence of stateless children born to U.S. citizens is therefore an important government interest.

b. Petitioner does not dispute that diminishing the incidence of statelessness is an important government interest. Petitioner argues (Br. 35-38), however, that

---

[7] We have been informed by the Department of State that U.S. posts in 14 countries and Jerusalem each submitted more than 1,000 consular reports of births abroad in 2009. A "Consular Report of Birth" is filed for any U.S. citizen under the age of 18 who was born abroad and who acquired U.S. citizenship at birth. See United States Dep't of State, *Form DS-2029, Application for a Consular Report of Birth* (Jan. 2010), http://www.state.gov/documents/organization/83127.pdf. In descending order of numerosity, those posts were in: Mexico, Germany, Great Britain, Japan, Canada, Jerusalem, Israel, Philippines, Yemen, Vietnam, Dominican Republic, People's Republic of China (including Taiwan), Australia, Italy, and South Korea. Of those 15 posts, only two—Mexico and Canada—apply *jus soli* laws.

that was not, in fact, Congress's goal when it enacted the shorter physical-presence requirement applicable to unmarried mothers of foreign-born children. Petitioner is incorrect. The evolution of this country's naturalization laws, as well as the legislative history of the relevant Acts of Congress in 1940 and 1952, shows that Congress was concerned with the possibility that too many foreign-born children of unwed U.S. citizen mothers would be born stateless.

i. Prior to 1940, Congress had provided "by successive acts" "for the admission to citizenship of * * * [f]oreign-born children of American citizens, coming within the definitions prescribed by Congress." *Wong Kim Ark*, 169 U.S. at 672. The first Act of Congress governing foreign-born children of citizen parents provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. From 1790 through until 1934, federal statutes extended citizenship to foreign-born children based upon the U.S. citizenship of a child's father. See Frederick Van Dyne, *Citizenship of the United States* 32-34 (1904). In 1934, Congress eliminated —on a prospective basis —the distinction between children of citizen fathers and children of citizen mothers by providing that any child "whose father or mother or both * * * is a citizen" would be a citizen, if (1) at least one citizen parent satisfied a requirement of residency in the United States before the child's birth, and (2) the child, if born to one citizen parent and one non-citizen parent, satisfied a residency requirement and took an oath of allegiance.

Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (reprinted in *Bellei*, 401 U.S. at 818 n.2).[8]

Before 1940, none of the laws granting U.S. citizenship to foreign-born children had expressly addressed the issue of children born out of wedlock. For many years, the 1855 and 1934 Acts had been interpreted and applied to afford citizenship to children born out of wedlock who had a U.S. citizen father, if the child subsequently was legitimated by marriage of the child's parents or otherwise in accordance with the governing state or foreign law. See *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (printed 1945) (*1940 Hearings*); 32 Op. Att'y Gen. 162 (1920); 39 Op. Att'y Gen. 556 (1937). When a child was born abroad out of wedlock to a U.S. citizen mother, the State Department's practice was to recognize the child as a citizen, on the rationale that the mother stood in the position of the father in such cases. *1940 Hearings* 431. However, the Attorney General rejected that view in 1939, at least with respect to children born before the 1934 Act. 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). In so doing, the Attorney General suggested that the unavailability of citizenship to children born abroad out of wedlock to a U.S. citizen mother would be a proper subject for congressional action. 39 Op. Att'y Gen. at 291.

---

[8] In 1994, Congress eliminated the distinction for children born prior to the effective date of the 1934 Act. See 8 U.S.C. 1401(h) (conferring citizenship on children of a citizen mother who meets a residency requirement, if the child was born abroad prior to May 24, 1934), as added by the Immigration and Nationality Technical Corrections Act of 1994 (1994 Act), Pub. L. No. 103-416, § 101(a)(2), 108 Stat. 4306.

ii. Congress addressed that issue when it undertook a general overhaul of the naturalization laws in 1940. In 1938, President Roosevelt had submitted to Congress a proposed new nationality code (Proposed Code) that had been prepared by his Secretary of State, Attorney General, and Secretary of Labor. *1940 Hearings* 405-507. In drafting the Proposed Code, "[t]he problem of the child born abroad to parents of different nationalities was the subject of extended consideration." *Id.* at 409. The drafters proposed that citizenship be conferred at birth on such a child if the citizen parent had resided in the United States for at least ten years before the child's birth, and suggested that the child be required to satisfy a residency requirement and take an oath of allegiance after turning 21. *Id.* at 426-427. The drafters explained that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character." *Id.* at 426. Congress eliminated the oath of allegiance, toughened the parental residency requirement, and altered the wording slightly, but otherwise adopted the drafters' proposal as Section 201(g) of the Nationality Act of 1940 (1940 Act), Ch. 876, 54 Stat. 1139. The physical presence requirements have been reduced over the years, but the same basic provision remains in force today as 8 U.S.C. 1401(g).

Section 205 of the 1940 Act (Pet. Br. App. 3) in turn addressed the status of children born abroad out of wedlock, which had been thrown into some confusion by the Attorney General's 1939 opinions, discussed above. The first paragraph of Section 205 provided that, in the case of a child born out of wedlock to a U.S. citizen father, the provisions of Section 201 (governing the status of children born in wedlock) would apply, "provided the pater-

nity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139; see *Nguyen*, 533 U.S. at 60-73. The second paragraph of Section 205 ensured that children born abroad out of wedlock could obtain U.S. citizenship based upon the U.S. citizenship of their mother, which would have been in doubt in the absence of a specific statutory provision. *1940 Hearings* 43; see 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). Because the situation of unwed citizen mothers was different from that of unwed citizen fathers, however, Congress deemed it appropriate to apply different rules. As relevant here, Congress reduced the physical-presence requirement as applied to unwed citizen mothers, by requiring only that the mother have been physically present in the United States at some point prior to the birth of the child.

In preparing the Proposed Code, the Administration surveyed the citizenship laws of other nations and discovered that in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). *1940 Hearings* 431; see Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935) (Sandifer, *Comparative Study*). Combined with the American rule of *jus soli*, the result of those *jus sanguinis* laws was to create a risk of statelessness among the foreign-born children of unwed U.S. citizen mothers. Such children, having been born abroad, would not be citizens of the United States by birth under the Fourteenth Amendment. But, unless the child's mother had dual citizenship, such a child generally would also not be a citizen at birth of any foreign country. Thus, unless

the law of the United States took into account the *jus sanguinis* rules of other nations, those children would be born stateless if the mother had not satisfied a 10-year physical-presence requirement prior to the child's birth.

Petitioner argues (Br. 35-38) that the issue of statelessness was not discussed in enacting the different physical-presence requirements. To the contrary, as explained above, the Proposed Code Congress considered was crafted specifically to address the citizenship of children born abroad out of wedlock to a U.S. citizen mother whose child could not obtain the citizenship of his father. Indeed, the issue of statelessness had been discussed as early as 1933, when Congress considered (but did not adopt as part of the 1934 Act) a provision addressed explicitly to the situation of children born abroad out of wedlock. See *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (State Department proposed amendment providing that a child born out of wedlock outside the United States to a U.S. citizen parent who has resided in the United States, if there was "no other legal parent under the law of the place of birth, shall have the nationality of such American parent"); see also *id.* at 54-55 (discussing statelessness problem in the context of English-American marriages). The issue was raised again in the *1940 Hearings* (at 43).

In 1952, Congress sought to strengthen the assurance of a connection to the United States by requiring that, in order to transmit citizenship to her foreign-born

child, an unwed U.S. citizen mother must "ha[ve] previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." INA, ch. 477, § 309(c), 66 Stat. 239. Congress did not, however, alter the judgment it made in 1940 that it was inappropriate to subject unwed U.S. citizen mothers who gave birth abroad to the same physical-presence requirements as all other citizen parents (married or unmarried). And Congress afforded additional protection against statelessness for children born abroad out of wedlock to a U.S. citizen mother by expressly providing that the child would not lose his U.S. citizenship upon legitimation by the father. The Senate Report explained that that change was appropriate to further "insure[] that the child shall have a nationality at birth." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952).

Thus, petitioner is incorrect that Congress was not concerned with diminishing the chance of a child's being born stateless when it enacted (and amended) the different physical-presence requirements applicable to citizen parents of children born abroad out of wedlock.

2. The Physical-Presence Requirement In Section 1409(c) Is Substantially Related To The Important Government Objective Of Reducing Statelessness

In enacting the statutory provisions at issue in this case, Congress sought to reduce the number of children who would be born stateless. Petitioner argues (Br. 23-31, 38-44) that the statutory framework violates the Fifth Amendment's guarantee of equal protection because it leaves some foreign-born children of unwed U.S. citizen fathers at risk of statelessness as well. But that argument is unavailing. In theory, Congress could have

chosen to eliminate the possibility that *any* child with at least one U.S. citizen parent would be born or become stateless by enacting a broad *jus sanguinis* law to supplement the Fourteenth Amendment's *jus soli* rule. But Congress had competing goals in enacting rules of naturalization—including ensuring that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship. Congress implemented the latter goal by requiring that U.S. citizen parents satisfy physical-presence standards before being eligible to transmit citizenship to their foreign-born children. In an effort to accommodate both important government interests, Congress likewise chose to apply a physical-presence requirement to unwed citizen mothers of foreign-born children, but adopted one of shorter duration because it understood that the children of unwed mothers were at greater risk of being born stateless than the foreign-born children of all other citizen parents, both married and unmarried. Because Congress's choice was substantially related to the important government interest of reducing statelessness, it is constitutional under either rational basis or heightened equal protection review.

a. Unwed U.S. Citizen Mothers And Fathers Are Not Similarly Situated With Respect To The Risk That Their Foreign-Born Child Will Be Stateless At Birth

1. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same in a particular context in which they are not similarly situated. *See, e.g.*, *Ballard*, 419 U.S. at 508. And this Court has held, in particular, that unwed U.S. citizen mothers and unwed U.S. citizen fathers are not

similarly situated in every respect. See *Nguyen*, 533 U.S. at 63; *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979); see also *Lehr*, 463 U.S. at 266-268. In enacting Section 1409, Congress reasonably concluded that unwed mothers are less favorably situated than unwed fathers with respect to the risk that a foreign-born child will be born stateless. The difference in each parent's situation is attributable to what this Court in *Nguyen* described as the "significant difference between the[] respective relationships" of unwed mothers and unwed fathers "to the potential citizen at the time of birth." 533 U.S. at 62.

As noted above, when Congress enacted a new naturalization code in 1940, it understood that a majority of countries employed *jus sanguinis* laws rather than *jus soli* laws. Sandifer, *Comparative Study* 249-259.[5] In most of those countries (indeed, in most *jus soli* countries as well), when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of the birth usually was the mother. See *id.* at 258 & n.38. Although the child's father could subsequently obtain the status of a legal parent through legitimation (typically through marriage) or perhaps through other formal means, the establishment of such a relationship did not occur as a result of the birth alone. Thus, the only parent eligible to transmit citizenship *at*

---

[5] In describing the laws of the countries he surveyed, Sandifer classified them as "unconditional" *jus soli*, "principally" *jus soli*, "solely" *jus sanguinis*, "virtually" *jus sanguinis*, and "principally" *jus sanguinis*. See *Comparative Study* 249-254. But for purposes of determining the risk that the foreign-born child of a U.S. citizen parent would be born stateless, any rule that is predicated in part or in whole on the citizenship of a child's parent or on the child or parent's taking some action after the birth—rather than being predicated on the birthplace of the child alone—would qualify as a *jus sanguinis* rule.

the time of birth in a country in which citizenship was based on citizenship of a parent was the mother. That state of affairs created a substantial risk that a child born to an unwed U.S. citizen mother in a country employing *jus sanguinis* laws would be stateless at birth unless the mother could pass her citizenship to her child.

Petitioner does not seriously challenge the accuracy of this assessment of the risk that unwed U.S. citizen mothers would give birth abroad to stateless children. Instead, he argues (Br. 38-44) that it was unconstitutional for Congress not to also take account of the risk that some U.S. citizen fathers might inflict statelessness upon children born in *jus sanguinis* countries by legitimating the child or otherwise legally formalizing their relationship with the child at some point *after* the child's birth, because in some *jus sanguinis* countries, a child of unwed parents of different nationalities might not have retained his mother's citizenship after the foreign father had established his paternity.[10] In so arguing, petitioner still fails to take account of the relevant ways in which unwed mothers and unwed fathers are not similarly situated. The unwed U.S. citizen father of a child born in a *jus sanguinis* country does not run the same risk that his child will be *born* stateless. To be sure, his child is unlikely to be a U.S. citizen from birth unless the father has satisfied the physical-presence requirements in Section 1401.[11] But the same is true for the children

---

[10] Petitioner is in no position to assert any unfairness on that basis because he was born in a *jus soli* country and was therefore entitled to Mexican citizenship by virtue of his birth. See Constitución Política de los Estados Unidos Mexicanos, as amended, Art. 30, Diario Oficial de la Federación, 5 de Febrero de 1917 (Mex.).

[11] Unwed citizen fathers are also required to satisfy conditions subsequent, such as acknowledging paternity. See 8 U.S.C. 1409(a); *Nguyen*,

of married citizen fathers and married citizen mothers. Congress need not ensure that all children with one U.S. citizen parent will be born U.S. citizens—and, in fact, Congress has affirmatively chosen not to do so. The critical point for present purposes is that, even if the unwed U.S. citizen father of a child born abroad has not satisfied the requirements for transmission of U.S. citizenship, the child is unlikely to be *born stateless* because the child will have the citizenship of his mother. By contrast, there is a significant risk that the child born abroad of an unwed U.S. citizen mother would be stateless at birth if the mother has not satisfied the requirements for transmission of U.S. citizenship. It was to prevent that condition of statelessness—a condition that is "deplored in the international community of democracies." *Trop*, 356 U.S. at 102—that Congress provided a shorter physical-presence requirement for the unwed citizen mother in Section 1409(c).

The constitutional validity of the balance Congress struck is not impugned by the possibility that a citizen father who cannot satisfy the physical-presence requirements in Sections 1401 and 1409(a) might take some step *after* the birth of his child that could render the child stateless. Whether such a father takes steps to establish his paternity when doing so would have the effect of terminating the citizenship the child obtained at birth from his mother is entirely within the father's control. This Court has acknowledged that a legislature may impose consequences on a child based on his father's choice of residence, see *Chin Bow*, 274 U.S. at 669, or his choice whether to establish paternity, see *Lehr*, 463 U.S. at

---

533 U.S. at 59. When such conditions are satisfied, the child is deemed to have been a citizen from his date of birth. *Id.* at 72.

264. See also *Miller*, 523 U.S. at 441 (opinion of Stevens, J.). Whatever the consequences of such post-birth actions, however, Congress reasonably concluded that, because of the differing legal treatment of the parental relationship of unwed U.S. citizen mothers and unwed U.S. citizen fathers at the time of their child's birth, unwed mothers and unwed fathers are not similarly situated with respect to the risk that their foreign-born children would be stateless at birth. Moreover, it is far less likely today than in 1940 or 1952 that subsequent legitimation of the foreign-born child by the U.S. citizen father would result in the child's losing the citizenship determined at birth through his mother.[12]

---

[12] Petitioner relies in part (Br. 30 n.10) on 1929-era laws in China, Costa Rica, Germany, Romania, Iraq, Netherlands, Japan, and Monaco, and 1954-era law in Jordan that expatriated the child born out of wedlock who had acquired its mother's citizenship if the child's foreign father legitimated the relationship. But (as is apparently suggested by amici Scholars on Statelessness (at 9-11)) few countries today expatriate a child born out of wedlock upon legitimation by a foreign father. See Nationality Law (promulgated by the Standing Comm. of the Nat'l People's Congress, Sept. 10, 1980, effective Sept. 10, 1980) 1 P.R.C. Laws (1979-1982) 182 (1987) (except the People's Republic of China does not permit dual nationality, see *id.* Art. 3); Constitución Política de la República de Costa Rica de 1949, with amendments through 2003, Tit. II; Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, Reichsgesetzblatt [RGBl.] 583, as last amended by Gesetz, Feb. 5, 2009, Bundesgesetzblatt [BGBl.] I at 1970 (F.R.G.); Lege Nr. 21 din 1 martie 1991, Legea cet eniei române [Law No. 21 of Mar. 1, 1991, as amended through May 17, 2009] [Nationality Act] (Rom.); Loi 1.155 relative à la Nationalité modifiée par la loi 1.276 du 22 décembre 2003 [Law 1.155 of December 18, 1992 on Nationality as amended by Law 1.276 of December 2003], Codes et Lois de la Principauté de Monaco, I Lois, Règlements, Arrêtés, Heading 11.21 (Editions du Juris-classeur).

In the Netherlands, legitimation or recognition results in the loss of nationality only if the child thereby acquires the nationality of the alien parent or already possesses it and the loss of nationality does not occur

ii. In a *jus sanguinis* country, if steps are not taken to legitimate the child or otherwise formalize the father's status—steps that may never be taken or may never be completed successfully—the unwed mother will almost always remain the only legal parent from the time of the child's birth forward. Simply as a practical matter, therefore, for a child born out of wedlock, the

---

"if and for as long" as a parent possesses Netherlands nationality. Rijkswet op het Nederlanderschap [Kingdom Act on Netherlands Nationality] Stb. 1984, p. 628, Art. 16. Indeed, it appears that Taiwan is the only one of the nine countries cited by petitioner in which could a child born today could lose his foreign nationality if his U.S. citizen father legitimated him in circumstances that would then render the child stateless. But even in Taiwan, the loss of citizenship is not automatic but conditional on the "permission of the Ministry of the Interior." Guo Ji Fa [Nationality Act] (promulgated Feb. 5, 1929, last amended Jan. 27, 2006), Yue Dan Jian Ming Liu Fa I-105 (2009) (Taiwan), Art. 11. Iraqi law, which previously did not permit a child to acquire the nationality of his mother, now provides that a child is Iraqi if born to an Iraqi father or mother, and it does not contain provisions dictating expatriation of a child born out of wedlock upon legitimation or recognition by a foreign father. Nationality Law 26 of 2006 (Iraq), Art. 3.

In Japan, which previously allowed a mother to transmit her citizenship to her child born out of wedlock only if the father was unknown or stateless, or if the mother acknowledged her parentage first, either the father or the mother can now equally transmit citizenship, although the father must adhere to additional procedures to establish paternity; there is no provision for expatriation upon acknowledgment of paternity or legitimation by a foreign father. Kokuseki ho [Nationality Law], Law No. 147 of 1950, last amended by Law No. 88 of 2008 (Japan), Arts. 2, 3. In one other country cited by petitioner, Jordan, citizenship is currently transmitted through the mother only if filiation with the father is not established, or if the father's nationality is unknown or he is stateless. The current law does not contain any specific provision for expatriation upon establishment of filiation to an alien father, although the provision described in the foregoing sentence suggests as much. The nationality law, however, also permits dual nationality. Jordanian Nationality Law No. 6 of 1954, Arts. 3(4), 17.

surest source of citizenship at the time of birth was and remains the child's mother, and obstacles to the transmission of that citizenship substantially increase the risk that the child will be born stateless.

It is true that some countries today permit either a mother or a father to transmit citizenship to a child, regardless of the marital status of the parents or the place of the child's birth.[13] Others, however, retain older laws specifying that only the mother of a child born out of wedlock may transmit citizenship, at least in the absence of legitimation.[14] And, as discussed *supra*, even when a father *can* transmit citizenship to a child born out of wedlock, the father (or the child himself, or the mother on the child's behalf) must in almost all cases take *some* affirmative and formal step in order to establish the father's connection to the child—steps ordinarily not required for a mother to establish her relationship to the child.[15] Indeed, such affirmative steps are required for

---

[13] See, *e.g.*, Lov nr. 51/2005 om norsk statsborgerskap [Act No. 51/2005 on Norwegian Citizenship], as amended by Act No. 36 of 30 June 2006, chap. 2, § 4; Legea Nr. 21 din 1 martie 1991, Legea cet eniei române [Law No. 21 of Mar. 1, 1991, as amended through May 17, 2009] [Nationality Act] (Romania), Art. 5.

[14] See, *e.g.*, Staatsbürgerschaftsgesetz 1985 [Federal Law on Austrian Nationality 1985] Bundegesetzblatt [BGBl] No. 311/1985, as amended by Staatsbürgerschaftsrechts-Novelle 2005 BGBl I No. 37/2006, arts. 7(3), 7a (Austria)

[15] See, *e.g.*, Nationality Act, as last amended Aug. 19, 2007, § 4 (F.R.G.); Kay Hailbronner, EUDO Citizenship Observatory, *Country Report: Germany* 16 (rev. Apr. 2010); British Nationality Act 1981, § 50(9A), as amended by British Nationality, Immigration and Asylum Act 2002, § 9; British Nationality (Proof of Paternity) Regulations 2006 (setting forth requirements as to proof of paternity); Turkish Citizenship Law, Law No. 5901/2009, Art. 7, Sect. 3; Netherlands Nationality Act (as in force on 13 April 2010), Art. 4; Immigratie-en Natural-

a U.S. citizen father to transmit citizenship, as set forth in 8 U.S.C. 1409(a), and those requirements were sustained by this Court against an equal protection challenge in *Nguyen*. Thus, the establishment of the father's connection to the child may not be completed until months or years after the child's birth, or may not be undertaken at all.

By contrast, an unwed mother, whose name generally appears on the birth certificate and who is present with the child at birth, is almost universally recognized as having a parental relationship with the child by virtue of the birth alone, without her needing to take any further action. *Nguyen*, 533 U.S. at 62. If that mother is not permitted to transmit her citizenship to her child at that time or at all, her child may be stateless. It therefore follows from *Nguyen* that Congress could properly take account of the different status of children born abroad out of wedlock to U.S. citizen mothers, as compared to U.S. citizen fathers, by adopting a shorter physical-presence requirement to minimize that risk of statelessness.

Thus, today, as in 1940, the application of foreign law, combined with potential problems of proof and paternal inaction, puts the foreign-born child of an unwed U.S. citizen mother at significantly greater risk of being stateless at the time of the birth (and thereafter) than the foreign-born child of other U.S. citizen parents. Congress's decision to minimize the physical-presence threshold that an unwed U.S. citizen mother must satisfy before she can transmit citizenship to her foreign-born child is therefore substantially related to its important interest in reducing statelessness. See *Fiallo*, 430

---

isatiedienst (Netherlands Immigration and Naturalisation Service), How Can You Acquire Dutch Citizenship.

U.S. at 795 n.6 (finding that it is appropriate for Congress to take into account "problems of identification, administration, and the potential for fraud" in determining who should be admitted).[16]

b. The Statutory Framework Is Not Premised On Stereotypes About Mothers And Fathers

Petitioner and his amici assert (Pet. Br. 35-38; ACLU Br. 23-24; Nat'l Women's Law Ctr. Br. 12-21) that the different physical-presence requirements applicable to unwed U.S. citizen parents of a child born abroad are impermissibly based on generalizations and stereotypes about men and women. That is not so. Congress's decision to apply a shorter physical-presence requirement to unwed mothers was based on the *legal* reality—not stereotypes about differing talents or behavior of men and women—that an unwed mother is established at the time of her child's birth as the child's legal parent while the unwed father usually is not. This Court acknowledged that reality in *Nguyen*, and found the differential treatment of unwed mothers and fathers on that basis

---

[16] Amici Scholars on Statelessness point out (at 20) that many countries do not specifically provide for the transmission of citizenship for children born out of wedlock. But even when a country does not explicitly take into account whether a child's parents are married in determining its citizenship rules, it remains true by virtue of the unwed mother's giving birth to the child that the only parent likely to be legally recognized as an out-of-wedlock child's parent at birth is the mother. See Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 217 (1934). Thus, it is more likely that a child born out of wedlock in a *jus sanguinis* country will take his mother's citizenship because, as recognized in *Nguyen*, the parental relationship of an unmarried mother is established by the birth, whereas an unmarried father must thereafter undertake some affirmative steps (or they must be undertaken by the mother or child) to establish the parental relationship.

"is neither surprising nor troublesome from a constitutional perspective." 533 U.S. at 63; *ibid.* ("Fathers and mothers are not similarly situated with regard to proof of biological parenthood."); see also *Miller*, 523 U.S. at 444 (opinion of Stevens, J.).

At base, Congress's decision to impose a shorter physical-presence rule on unwed mothers than on all other parents was based on the fact that other countries apply *jus sanguinis* laws that require a child to acquire the citizenship of one or both of his legal parents at the time of his birth—and for children born out of wedlock, the mother is generally the only legal parent at birth. If, as this Court held in *Nguyen*, 533 U.S. at 63, it is permissible for Congress to apply different rules regarding the conferral of citizenship based on the different positions an unwed mother and an unwed father occupy with respect to the child at the time of birth, it is surely within Congress's constitutional authority to take account of the fact that other countries do so as well. Thus, "the different treatment of men and women [in Sections 1401 and 1409] reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female [unwed citizen parents] are *not* similarly situated with respect to" their child's claim to United States citizenship at birth. *Ballard*, 419 U.S. at 508.

c. Congress Can Constitutionally Address An Aspect Of The Problem Of Statelessness Without Eliminating The Problem In Its Entirety

i. Petitioner and his amici contend (Pet. Br. 38-44; Scholars on Statelessness 8-15) that Congress violated the Fifth Amendment's guarantee of equal protection by attempting to reduce the incidence of unwed citizen mothers' children being born stateless because it did

not, in so doing, eliminate the possibility that any child of a U.S. citizen would be born—or later become—stateless. That contention is not based on any established constitutional principle. On the contrary, the Constitution requires at most a substantial fit between Congress's objective and the means of achieving it. Congress's statutory scheme need not "be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Even under heightened equal protection review, a classification need not be drawn with mathematical precision. In particular, this Court has recognized that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (citations omitted). Moreover, when, as in enacting Section 1409, Congress is *balancing* competing interests, it cannot serve both interests fully, and indeed must accommodate each to the other. It is true that the current statutory scheme in place both leaves some foreign-born children of a U.S. citizen parent at risk of becoming stateless and permits unwed citizen mothers to transmit their citizenship to a foreign-born child even in circumstances when that child is not at risk of statelessness because he (like petitioner) is born in a *jus soli* country. But Congress's goal in enacting the statutes at issue was to *reduce* the risk of statelessness, not to eliminate it completely at all costs, and at the same time to take account of any countervailing considerations. Congress could permissibly choose to address its efforts to that more multifaceted goal. *Nguyen*, 533 U.S. at 69 (stating statute should not be invalidated "because Congress elected to advance an interest that is less demanding to satisfy than some other alternative"). And Congress's decision to apply different physical-

presence rules on a categorical basis rather than based on a case-by-case congressional or administrative assessment of the laws governing citizenship in particular foreign countries at a particular time—and for a particular child—represents a legitimate accommodation of foreign policy, feasibility, and other interests.

ii. Petitioner argues (Br. 29, 32, 37, 41-42) that Congress is not permitted (even under rational basis review) to enact a naturalization scheme that may have the effect of discouraging some unwed fathers from legitimating their children. But petitioner takes an overly narrow view of the options available to such parents. First of all, unwed U.S. citizen fathers are treated exactly the same for purposes of physical-presence requirements as *married* citizen fathers and mothers, whose parental relationship is legally established at the time of their children's birth. See also pp. 50-51, *infra*. More significantly, petitioner ignores the many avenues to U.S. citizenship open to the foreign-born child of an unwed U.S. citizen father.

Petitioner's argument seems premised on the view that the only acceptable means of transmitting U.S. citizenship to the foreign-born child of a citizen parent is to do so automatically and at birth. Constitutionally, of course, no foreign-born child is entitled to U.S. citizenship, and no U.S. citizen is entitled to bestow citizenship on a foreign-born child either at birth or later in the child's life. But Congress has provided a number of other means by which petitioner could have acquired U.S. citizenship, through the efforts of his father or on his own behalf. The availability of other avenues demonstrates that "Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers," *Nguyen*, 533 U.S. at 70-

71, but has instead employed various means of granting citizenship consistent with its underlying determination that there should be a sufficient connection between the United States and the child.

As part of the 1940 Act, Congress enacted Section 315, which permitted a U.S. citizen parent to "petition[] for the naturalization of" his or her "child born outside of the United States" if the child was under the age of 18 years and was "residing permanently in the U.S. with the citizen parent." 54 Stat. 1146. That provision represented "entirely new legislation" intended in part to address the situation of a U.S. citizen parent who did not meet the physical-presence requirements to transmit citizenship to a foreign-born child at birth, but who later returned to live in the United States with the child. *1940 Hearings* 91. It "seem[ed] a humane and reasonable thing" to allow that child to acquire citizenship once the family moved back to the United States. *Ibid.* Congress reenacted Section 315 in slightly modified form as Section 322 of the INA in 1952 (8 U.S.C. 1433 (1970)). As modified, that provision permitted a citizen parent to petition for the naturalization of his or her "child born outside of the United States," if the child was under the age of 18 years and "residing permanently in the United States, with the citizen parent, pursuant to a lawful admission for permanent residence." 8 U.S.C. 1433(a) (1970). The statute further specified "that no particular period of residence or physical presence in the United States shall be required." *Ibid.*

In more recent years, Congress has continued to liberalize the naturalization rules applicable to foreign-born children of U.S. citizen parents, amending Section 1433 in 1994, see 1994 Act, § 102(a), 108 Stat. 4306, and in 2000, see Child Citizenship Act of 2000, Pub. L. No.

106-395, § 102(a), 114 Stat. 1632. Under current law, for example, if the foreign-born child of one citizen parent does not secure U.S. citizenship at birth because that parent did not have sufficient prior physical presence in the United States, the child will *automatically* be deemed a citizen under 8 U.S.C. 1431(a) if the child moves to the United States before the child turns 18 and resides in the legal and physical custody of that parent pursuant to a lawful admission for permanent residence. This provision was intended to "liberalize then-existing law to make it easier for foreign-born children of United States citizens to obtain citizenship." *Pina* v. *Mukasey*, 542 F.3d 5, 8 (1st Cir. 2008) (citing H.R. Rep. No. 852, 106th Cong., 2d Sess. 4 (2000)). And 8 U.S.C. 1433(a) now makes it possible for a child who does not automatically become a U.S. citizen under Section 1431 to become a citizen if the child is under 18 years of age, his U.S. citizen parent has resided in the United States for five years, the child is residing outside the United States in the legal and physical custody of the citizen parent, and the child is even temporarily present in the United States pursuant to a lawful admission.

In addition, a foreign-born child who does not qualify for citizenship at birth pursuant to Sections 1401 and 1409, but nevertheless develops substantial connections to the United States through marriage or permanent residence in the United States, may become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1423, 1427, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process (or if he rendered himself ineligible by engaging in criminal activity). Cf. *Lehr*, 463 U.S. at 264.

III. EVEN IF THE DISTINCTIONS CONGRESS DREW IN SECTIONS 1401 AND 1409 WERE FOUND TO BE UNCONSTITUTIONAL, PETITIONER WOULD NOT BE ENTITLED TO RELIEF

Even if this Court were to determine that Congress's decision to impose a shorter physical-presence requirement on unwed U.S. citizen mothers than on all other U.S. citizen parents of foreign-born children violates equal protection principles, petitioner would not be entitled to the relief he seeks—a reversal of his criminal conviction based on a determination that he has been a U.S. citizen from birth. As Justice Scalia explained in his concurrence in *Miller*, "when a statutory violation of equal protection has occurred, it is not foreordained which particular statutory provision is invalid." 523 U.S. at 458; see *Nguyen*, 533 U.S. at 72 (acknowledging "'potential problems with fashioning a remedy' were [the Court] to find the statute unconstitutional") (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)). An examination of the statutory framework, the need to preserve necessary flexibility for Congress, as well as adherence to this Court's longstanding treatment of naturalization requirements, leads to the conclusion that the proper way to cure any equal protection violation would be to apply the longer physical-presence requirements in Section 1401, on a prospective basis, to unwed citizen mothers. See *United States* v. *Cervantes-Nava*, 281 F.3d 501, 505-506 (5th Cir.), cert. denied, 536 U.S. 914 (2002). Such a ruling would allow Congress to decide whether or how to extend U.S. citizenship to children of unwed U.S. citizen fathers and mothers who do not meet the physical-presence requirements in Sections 1401 and 1409(a).

1. This Court has noted that, when a court sustains an equal protection claim, it "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (brackets in original) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)); see also *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is a mandate of equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers).").

As petitioner acknowledges (Br. 50, 61), however, in choosing which statutory provision to strike, the Court must be guided by congressional intent. Indeed, Congress is best positioned to structure the balance between the possibility of statelessness and appropriate limits on naturalizing aliens. Petitioner relies (see Br. 46-62) on the INA's severability clause, § 406, 66 Stat. 281, as evidence that Congress would have intended to apply the shorter physical-presence requirement in Section

1409(c) to unwed citizen fathers rather than to apply the longer requirement in Section 1409(a) to unwed citizen mothers. But the inclusion of a severability clause provides no indication about *which* statutory provision Congress would have severed had it known the Court would find that the shorter period for children of unwed citizen mothers violates equal protection. Other aspects of the constitutional and statutory framework supply that answer.

a. A judicially crafted regime of the type petitioner seeks would be inconsistent with this Court's cases holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is to enforce the legislative will in respect of a matter so vital to the public welfare."). Indeed, this Court acknowledged in *Nguyen* that "[t]here may well be potential problems with fashioning a remedy" if the Court were to find that the additional requirements applicable to unwed citizen fathers under Section 1409(a) violated equal protection. 533 U.S. at 72 (internal quotation marks omitted) (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)); accord *Miller*, 523 U.S. at 523 (Scalia, J., concurring in the judgment) ("[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress."). If this Court finds an equal protection violation, it should not, therefore, ex-

tend the shorter physical-presence requirement in Section 1409(c) to unwed citizen fathers, thereby in turn conferring citizenship on a new category of individuals (the children of such fathers) who do not satisfy the statutory criteria set by Congress.

That conclusion is underscored by the consequences of the categorical expansion of citizenship petitioner seeks. That approach would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States, and it would raise questions concerning the status of their children, grandchildren, etc. Moreover, a ruling by this Court expanding citizenship to such persons would potentially be irreversible by Congress. If the Court equalized the treatment of children of unwed citizen mothers and other citizen parents by declaring invalid the exception in Section 1409(c) that creates the one-year physical-presence requirement for unwed mothers, Congress could at least override that resolution through constitutionally valid legislation. But it is less clear that Congress could reverse a ruling by this Court that extended the shorter physical-presence requirement to citizens in the position of petitioner's father. Once citizenship is properly conferred, Congress ordinarily may not take it away. See *Afroyim*, *supra*.

b. The result called for by the foregoing principles is reinforced by the interaction of the particular statutory provisions at issue here. As discussed above, Congress chose to apply the longer physical-presence requirement in the case of foreign-born children of the great majority of citizen parents—married mothers, married fathers, and unmarried fathers. The shorter period applies only in the case of the child of an unwed

citizen mother. If forced to choose between the two rules, there is no basis for assuming that Congress necessarily would have preferred to let the exception swallow the rule. Indeed, since 1940, when Congress first addressed the issue of an unwed citizen's ability to transmit U.S. citizenship to a foreign-born child (when the other parent is not a U.S. citizen), it has always applied to unmarried U.S. citizen fathers the longer physical-presence requirements applicable to married U.S. citizen fathers (and mothers).[17] Petitioner's requested holding "would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835.

In urging this expansion of citizenship that Congress has not authorized, petitioner stops short of arguing that the shorter physical-presence requirement in Section 1409(c) should be extended not only to unwed citizen fathers covered by Section 1409(a), but to *all* citizen parents of foreign-born children, including married citizen parents who (like unwed citizen fathers) are covered by the physical-presence requirements in 8 U.S.C. 1401. Ironically, petitioner justifies that result by suggesting

---

[17] Congress has also regularly declined to pass bills to further reduce the general physical-presence requirement in Section 1401(g) applicable to both married couples of different nationalities and unmarried U.S. citizen fathers. See, *e.g.*, H.R. 801, 106th Cong., 1st Sess. (2007); *Naturalization and Nationality Amendments and Parole for Funerals: Hearing before the Subcomm. on Int'l Law, Immigration & Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 45-46 (1993) (statement of Michael Adler, Chair, Citizenship Comm., World Fed'n of Americans Abroad); 138 Cong. Rec. 33,469 (1992) (statement of Rep. Alexander); H.R. 1380, 101st Cong., 1st Sess. (1989); *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on H.R. 783 and H.R. 97 before the Subcomms. of the Comms. on the Judiciary*, 82d Cong., 1st Sess. 81 (1951).

that it would address Congress's concern—which petitioner otherwise impugns throughout his brief—about stateless children, because extending that benefit would result in fewer stateless children otherwise born to unwed citizen fathers. But petitioner's reliance on that interest when he turns to the question of remedy highlights two further statutory anomalies in petitioner's proposed solution.

First, to the extent petitioner is correct that some foreign-born children of unwed citizen fathers are at risk of statelessness if the father later legitimates the child, that risk is even greater with respect to the children of *married* citizen fathers, because such children are legitimate from birth. There is thus no reason of fairness to treat children of married fathers less favorably than those of unmarried fathers. But if those two categories were treated the same and both were permitted to benefit from the shorter physical-presence requirement in Section 1409(c), the result would be to leave married citizen mothers as the only parents subject to the longer physical-presence requirements, the mirror image of the equal protection violation petitioner sees in the current scheme. Second, given that unmarried fathers are at less risk than married fathers of having stateless children born abroad, petitioner offers no reason why Congress would choose to treat all unmarried U.S. citizen parents more favorably than all married U.S. citizen parents.

2. For the foregoing reasons, if the Court finds that the different physical-presence requirements applicable with respect to the children of unwed U.S. citizen mothers and the children of unwed U.S. citizen fathers violated the equal protection rights of petitioner's father, the appropriate means of curing that violation would be

to apply the longer physical-presence requirement to unwed citizen mothers. In doing so, however, the Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for at least a year prior to the birth (but less than the 10 or five years required by Section 1401(a)(7)). The Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. Cf. *Mathews*, 465 U.S. at 745-750 (upholding Congress's decision to continue for a limited time a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests). For children born abroad to unwed U.S. citizen mothers in the future, this result would engender the risk of statelessness that Congress sought to minimize by enacting Section 1409(c). But, critically, it would preserve the ability of Congress to devise a statutory solution to address that issue and other relevant considerations.

The complexities of any remedial approach do, however, reinforce the conclusions, set forth in Point II of this brief, that Congress's legislation in the area of immigration and naturalization should be subject to highly deferential judicial review, that the distinctions Congress drew in Sections 1401 and 1409 in any event pass constitutional muster under *Nguyen*, and that any perceived unfairness in the statutory scheme is for Congress to remedy, taking account of the numerous and often competing considerations involved in conferring U.S. citizenship.

3. Petitioner suggests (Br. 59-62) that, as an alternative to his preferred approach, the Court could excise only the portion of Section 1401, as applied through Section 1409(a), that required unmarried fathers to reside in the United States for five years after the age of 14. Such a result would give petitioner what he desires—citizenship and reversal of his conviction—and it would have a somewhat more limited impact, but it would not cure the supposed constitutional violation, because it would continue to impose a longer physical-presence requirement on unwed citizen fathers as a general matter. And it would encounter the other obstacles identified above.

4. Finally, petitioner asks (Br. 62) that his conviction be reversed even if the Court finds an equal protection violation but does not extend the shorter physical-presence requirement to his father. Petitioner reasons that, in that event, he would have been convicted based on a finding of alienage made pursuant to an unconstitutional scheme. But that is not so. If this Court finds an equal protection violation and corrects that violation by excising the shorter physical-presence requirement in Section 1409(c), the constitutional violation would be cured, but petitioner would remain an alien.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
LANNY A. BREUER
Assistant Attorneys General
EDWIN S. KNEEDLER
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DONALD E. KEENER
CAROL FEDERIGHI
ROBERT N. MARKLE
WILLIAM C. BROWN
Attorneys

AUGUST 2010

REPLY BRIEF

No. 09-5801

In The
Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

REUBEN CAMPER CAHN
STEVEN F. HUBACHEK*
ELIZABETH M. BARROS
VINCENT J. BRUNKOW
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Steven_Hubachek@fd.org

*Counsel of Record

CUCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

SUMMARY 1

ARGUMENT 3

I. PLENARY POWER DOES NOT MANDATE LESSER SCRUTINY 3

II. THE GOVERNMENT FAILED TO MEET ITS BURDEN TO DEMONSTRATE THAT AVOIDING STATELESSNESS AT BIRTH WAS CONGRESS'S ACTUAL PURPOSE 4

A. The Legislative History Reveals No Special Concern Regarding Statelessness 5

B. Congress Adopted Residence Requirements in Response to Stereotype-Based Concerns Whether Foreign-Born Children Would Be Raised as Americans 9

III. EVEN IF AVOIDING STATELESSNESS IS THE ACTUAL PURPOSE, THE REQUISITE "FIT" IS LACKING 12

IV. THE PROPER REMEDY IS EXTENSION TO NON-MARITAL FATHERS ONLY 19

A. Because Custodial Fathers of Non-Marital Children Are Equally Adept at Inculcating American Values, Extension Is Proper 21

TABLE OF CONTENTS – Continued

Page

B. Fathers of Non-Marital Children, Not Parents In Mixed Nationality Marriages, Are Similarly Situated to Unwed Mothers As to Both Statelessness Risks And Lack Of Foreign Influence 23

C. The Court May Strike the Inordinate and Unnecessary Restriction On Younger Fathers 25

V. PETITIONER HAS STANDING 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006).....25

Califano v. Westcott, 443 U.S. 76 (1979).....18, 20, 21, 22, 24

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).....27

Carey v. Population Services, Int'l, 431 U.S. 678 (1977).....28

Craig v. Boren, 429 U.S. 190 (1976).....13, 26, 27

Eisenstadt v. Baird, 405 U.S. 438 (1972).....26

Fiallo v. Bell, 430 U.S. 787 (1977).....3

Heckler v. Mathews, 465 U.S. 728 (1984).....19, 20, 22

INS v. Pangilinan, 486 U.S. 875 (1988).....20

Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931).....19

J.E.B. v. Alabama, 511 U.S. 127 (1994).....12, 16

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).....14

Kowalski v. Tesmer, 543 U.S. 125 (2004).....26, 27

Lehr v. Robertson, 463 U.S. 248 (1983).....14, 15

Marbury v. Madison, 5 U.S. 137 (1803).....19

Miller v. Albright, 523 U.S. 420 (1998).....11, 12, 22, 27

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).....12

TABLE OF AUTHORITIES – Continued

Page

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 18

Nguyen v. INS, 533 U.S. 53 (2001) ..... *passim*

Powers v. Ohio, 499 U.S. 400 (1991) 27, 28

Singleton v. Wulff, 428 U.S. 106 (1976) 27

Trop v. Dulles, 356 U.S. 86 (1958) 8, 14

United States v. Ginsberg, 243 U.S. 472 (1917) 20

United States v. Virginia, 518 U.S. 515 (1996) 4, 18, 22

Weedin v. Chin Bow, 274 U.S. 657 (1927) 3, 14, 15

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 22

Welsh v. United States, 398 U.S. 333 (1970) 19, 23

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) 22

Zadvydas v. Davis, 533 U.S. 678 (2001) 3

FEDERAL STATUTES

8 U.S.C. §1401 ..... 11, 26

8 U.S.C. §1409 ..... 15, 21, 23, 26

Act of Mar. 26, 1790, ch.3, 1 Stat.104 3

Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, §12, 100 Stat. 3655, 3657 19

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization, 73d Cong., 1st Sess. (1933) 6, 9, 10

Respondents' Brief, Nguyen v. INS, 2000 WL 1868100 ..... 8, 23

Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935) 5

To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 414 (printed 1945) 3, 6, 7, 10, 11

UNICEF, *Factsheet: Birth Registration*, http://www.unicef.org/newsline/2003/03fsbirthregistration.htm (last visited Sept. 23, 2010) 8, 9

SUMMARY

Congress's scheme for transmission of citizenship by citizen fathers to non-marital children denies fathers equal protection because it imposes on men a 10-year, age-calibrated residence requirement – insurmountable here – while requiring, without age restrictions, a single year's residence for women. That sex-discrimination survives neither heightened nor rational basis review, and the Court may remedy it based on the INA's strong severability provision. Because fathers and mothers of non-marital children are similarly situated as to risk of statelessness of their children and because single-parent households headed by citizen men or women lack the foreign influence of an alien spouse, extending the residence requirement applicable to women to men is proper.

The Solicitor General claims that Congress undertook this sex-discrimination to avoid statelessness of non-marital children *at birth*. The suggestion that statelessness played *any* role in the imposition of the discriminatory scheme is pure conjecture, as demonstrated by his inability to quote statelessness discussions in the 1940 hearings.

Nor is there any rational, let alone exceedingly persuasive, basis to seek to avoid statelessness arising at birth yet to be indifferent to that "deplored" state if it arose later (during minority). Even if Congress deliberately drew that distinction, it would not justify the discrimination as men, too, are at risk of

having non-marital children who are stateless at birth.

The Solicitor General's arguments that the Court should either refuse to remedy the sex-discrimination or offer only prospective relief fail. His argument that there is no authority to grant relief overlooks the severability clause which contains no exceptions. Prospective "relief" is constitutionally impermissible: it offers Petitioner no remedy. The Solicitor General also exaggerates the scope of requested relief and overlooks the fact that children raised by single citizen-parents are more likely to be imbued with American values than foreign-born children of mixed-nationality marriages.

The attempt to avoid the issue based on third-party standing is meritless. Petitioner has standing because the discriminatory residence requirements enforced against Petitioner during his criminal prosecution indirectly resulted in the violation of his father's equal protection rights. Petitioner's father was also hindered from protecting his rights because he could not intervene in the prosecution, had no economic incentives to initiate separate proceedings, would have exposed his son to removal or prosecution if he had, and any efforts would interfere with Congress's preferred procedures. Petitioner is the "least awkward challenger" and "obvious claimant."

ARGUMENT

I. PLENARY POWER DOES NOT MANDATE LESSER SCRUTINY.

The Court should not undertake the deferential review described in *Fiallo v. Bell*, 430 U.S. 787 (1977), because *Fiallo* addressed only "the admission of aliens," *id.* at 792, and Congress's immigration power remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).[1] The Solicitor General ignores the latter point, but challenges the former, asserting inherent sovereignty, the power to exclude aliens, and the need for flexibility in the political branches. Br.U.S. 17-18.

Those considerations are most persuasive when, as in *Fiallo*, the question is the admission of aliens. The claim that citizenship at birth is indistinguishable from naturalizing an alien, Br.U.S. 19-20, contravenes a tradition predating the Constitution,[2] adopted by the First Congress,[3] and continued in the 1940 hearings,[4] that considers grants of citizenship at birth

---

[1] Pet.Br. 15-19.

[2] *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927) (traditionally, English subjects' foreign-born children "were[, at birth,] deemed natural-born subjects of that kingdom. . . .").

[3] Act of Mar. 26, 1790, ch.3, 1 Stat.104 (defining citizens by birth abroad as "natural born citizens").

[4] *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 414 (printed 1945) (*1940 Hearings*) (foreign-born

(Continued on following page)

equivalent to natural-born citizenship, rather than akin to naturalization by an alien. Neither persuasive argument nor precedent supports abandonment of that venerable tradition.

II. THE GOVERNMENT FAILED TO MEET ITS BURDEN TO DEMONSTRATE THAT AVOIDING STATELESSNESS AT BIRTH WAS CONGRESS'S ACTUAL PURPOSE.

Under intermediate scrutiny, legislation may be sustained only based on its "actual" purpose. *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). Lacking any specific statement indicating Congress's discrimination against fathers of non-marital children was animated by statelessness concerns, the Solicitor General invokes the "evolution of this country's naturalization laws" and urges inferential leaps from tangential citations to legislative history. Br.U.S. 25-30. The legislative history reveals no evidence that statelessness concerns impelled the differential residence criteria. Rather, the 1940 hearings suggest a distinction informed by sex-based stereotypes.

---

citizens at birth "have never been termed 'naturalized citizens.'").

A. The Legislative History Reveals No Special Concern Regarding Statelessness.

The Solicitor General piles inference upon inference in an effort to conjure up a Congressional goal of avoiding statelessness by way of an expansive reading of a source cited in the legislative record. Br.U.S. 28 (citing Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935)). As the *Brief of Amici Curiae Scholars on Statelessness*, 16-19, demonstrates, the Sandifer survey of 30 countries does not purport to address a concern that non-marital children of citizen mothers and alien fathers would be stateless. *Id.* 16. Not only would such a claim be inaccurate, *id.* 16-17, to the extent the survey supports an inference of a statelessness issue, that inference would also apply to citizen fathers' non-marital children. *Id.*; Sandifer 254, 257-259.[5] The Solicitor General offers no evidence that any 1940 Hearings participant shared his interpretation of Sandifer.

The Solicitor General's citations to the 1933 and 1940 hearings are based upon inferential leaps of

---

[5] The majority rule was that the child took the father's nationality upon legitimation. Sandifer 259. In some nations, including China, legitimation by a U.S. citizen father would deprive the child of its mother's nationality. Pet.Br. 30 n.10. "[A]pproximately 40% of the *jus sanguinis* population [was] contributed by China." Sandifer 257.

similar magnitude. First, he cites a rejected – and never revived – gender-neutral 1933 proposal that would have conferred U.S. citizenship on foreign-born, non-marital children if there was "'no other legal parent under the law of the place of birth. . . .'" Br.U.S. 29 (quoting *Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) ("1933 Hearings)). His assertion that "the issue of statelessness had been discussed as early as 1933," *id.*, is unsupported by any mention of statelessness in this citation.

His second 1933 citation is equally unavailing. Although statelessness was discussed "in the context of English-American marriages," *id.*, the issue raised had nothing to do with non-marital children: it concerned an English woman losing her nationality upon marriage to an American. *1933 Hearings* 54-55.

The Solicitor General asserts, without quotation, that "[t]he issue was raised again in the *1940 Hearings* (at 43)." Br.U.S. 29. His citation refers to non-marital births to women, but does not mention statelessness. *1940 Hearings* 43. Rather, a State Department official observes that the "object" of the scheme is to "give[ ] citizenship to those unfortunate children who are born illegitimately to American mothers." *Id.* The term "unfortunate" is far too general to connote the specific misfortune of statelessness. Because

many foreign-born, non-marital children of women had nationality (i.e., if born in *jus soli* states), "giv[ing] citizenship" does not imply curing statelessness. Rather, the official generically characterizes such children as "unfortunate," invoking the traditionally disfavored status of illegitimacy, consistent with the Administration's endorsement of the coverture-inspired stereotype of maternal responsibility for non-marital children. *Id.* 431. *See Nguyen v. INS*, 533 U.S. 53, 91 (2001) ("The history of sex discrimination in laws governing the transmission of citizenship and with respect to parental responsibilities for children born out of wedlock counsels at least some circumspection in discerning legislative purposes in this context.") (O'Connor, J., dissenting).

Finally, the Solicitor General cites a 1952 Senate Report explaining an amendment deleting a provision conditioning transmission of nationality by an unwed mother on the lack of legitimation by the father. Br.U.S. 29-30. That amendment had nothing to do with the differential residence criteria. Pet.Br. 37. Moreover, it was offered concurrently with a slight increase in the residence criterion applied to mothers of non-marital children, Br.U.S. 29-30, which belies the Solicitor General's contention that avoiding statelessness motivated Congress: that amendment incrementally increased such risks.

Nor is there record support for the Solicitor General's new refinement of his argument: the notion that Congress was concerned with statelessness *at birth* only. That statelessness is "'deplored'" and can

have "'disastrous consequences,'" Br.U.S. 24 (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Op. of Warren, C.J.)), provides no rationale for choosing to avoid it at birth while taking no steps to protect children who might become stateless, a risk the government concedes. *See Respondents' Brief, Nguyen v. INS*, 2000 WL 1868100, *18 n.9. *Accord Statelessness Scholars* 7-15. Nor does discriminating against fathers make sense: in cases where a father need only be known for nationality to pass through him, *Statelessness Scholars* 8-11, naming a citizen father on the foreign birth certificate would likely render the child stateless at birth if the father cannot transmit citizenship under U.S. law. The same inference obtains in countries where citizenship would pass through the citizen-father if he registers the non-marital child, or if both parents register together. *See* Sandifer 259 (citing seven countries). Finally, a non-marital child born in a *jus sanguinis* country of which neither parent is a citizen is likely stateless at birth regardless of which parent is a U.S. citizen. *Statelessness Scholars* 12 (as of 1940, three dozen countries did not permit female citizens to transmit nationality to a non-marital, foreign-born child with a foreign father).[6]

---

[6] Confining statelessness concerns to the moment of birth makes little practical sense. "[I]n 2000 alone, some 50 million births went unregistered — over 40 per cent of all estimated births worldwide that year." UNICEF, *Factsheet: Birth Registration*, http://www.unicef.org/newsline/2003/03fsbirthregistration.htm (last visited Sept. 23, 2010). Registration, which may occur years

(Continued on following page)

B. Congress Adopted Residence Requirements in Response to Stereotype-Based Concerns Whether Foreign-Born Children Would Be Raised as Americans.

Unlike the Solicitor General's conjectures, substantial evidence demonstrates Congress relied on gender stereotypes in adopting discriminatory residence requirements. Beginning in 1933, the record reveals concerns regarding the American character of children born abroad, *1933 Hearings* 9-10, that coincided with changes in U.S. law permitting women to transmit citizenship, and which were based on beliefs that citizen women married to foreign nationals would be so unlikely to inculcate their foreign-born children with American values that the children would be "essentially alien in character." *Id.* 9. Those concerns persisted through the 1940 hearings and informed Congress's assessment of residence requirements.

When the foreign-born child had two citizen-parents, the proposed code recommended the traditional minimal criterion – pre-birth U.S. residence for any length of time – because it was "altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in

---

after birth, is "fundamental to . . . [s]ecuring the child's right to a nationality. . . ." *Id.*

character." *1940 Hearings* 422-23. Thus, some prior U.S. residence and a home in which there was no foreign influence – both parents being citizens – were sufficient.

In the Committee's view, foreign-born children of mixed-nationality marriages "present[] greater difficulties and require[] correspondingly stricter limitations." *Id.* 423. It recommended "stricter limitations" – a 10-year residence requirement – reflecting the view that "[a] foreign-born child whose citizen parent has not resided in this country as much as 10 years altogether is likely to be more alien than American in character." *Id.* 426. The Committee thought it unlikely that children of mixed-nationality marriages would be raised as American and learn English "where the citizen parent who is married to an alien resides abroad for reasons having no connection with the promotion of American interests." *Id.* 427.

That conclusion was informed by gender-based stereotypes. The Committee noted that, in passing 1934 legislation allowing women who married aliens to confer citizenship, "Congress apparently took into consideration the fact that persons born in foreign countries whose fathers were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States . . . " and therefore imposed a 5-year residence requirement on foreign-born children. *Id.* 409. *Accord id.* 421. *See also 1933 Hearings* 9. Although the 5-year requirement applied to children of citizen-fathers and mothers, its articulated rationale concerned citizen

mothers deferring to foreign fathers. *1940 Hearings* 409, 421. The 10-year residence requirement was viewed as "strengthening" Congress's response to this "problem." *Id.* 409.

Congress's concern that the American character of the child's upbringing would be compromised if the child was raised in a mixed-nationality household was inapplicable if the child was born to two U.S. citizens[7] or to an unwed mother. As to non-marital children, the assumption was the mother was the sole parent. *Id.* 63 ("If the child has only one legal parent, because it is illegitimate, if that parent, the mother, is a national, the child acquires nationality."). *Accord id.* 62. The Committee adopted this view, invoking a tradition "under American law [in which] the mother has a right to the custody and control of [a non-marital] child as against the putative father, and is bound to maintain it as its natural guardian." *Id.* 431 (quotation omitted). In *Miller v. Albright*, the government correctly conceded Congress relied upon "an assumption that the citizen mother would probably have custody." 523 U.S. 420, 430 n.8 (1998) (Op. of Stevens, J.). Because the mother assumedly had custody, Congress's concerns regarding influential foreign fathers, *1940 Hearings* 409, 421, were inapt,

---

[7] Respondent repeatedly, and misleadingly, claims that stringent residence requirements apply to "all other citizen parents (married and unmarried)." Br.U.S. 30. *See id.* 20-23, 31, 40, 45, 48. No significant residence requirement applies when both married parents are citizens. 8 U.S.C. §1401(c).

eliminating any need for an expanded residence requirement. Congress effectively treated single-parent families headed by citizen mothers identically to two-citizen parent families.[8]

The only reason to assume that an unwed father is more like mixed-nationality parents – to whom the expanded residence-requirement applies – than an unwed mother or a two-citizen household is the assumption that the father will not be the custodial citizen-parent of his non-marital child. That postulate is the flipside of Congress's stereotypical "assumption that the citizen mother would probably have custody." *Miller*, 523 U.S. at 430 n.8.

III. EVEN IF AVOIDING STATELESSNESS IS THE ACTUAL PURPOSE, THE REQUISITE "FIT" IS LACKING.

Even if the sex-discrimination was adopted to avoid statelessness at birth, the government has not demonstrated an "'exceedingly persuasive justification,'" *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994), that is "substantially related to the achievement of [important government] objectives." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Citizen men, too, have non-marital children who are stateless at birth, and the Solicitor General offers no reason why Congress would seek to avoid statelessness

---

[8] Government counsel said as much below. *Excerpt of Record, Vol. I, 9th Cir. Case No.07-50445* 127.

arising at birth yet be indifferent to that "deplored" state if it arose afterward (and during minority).

The Solicitor General's contention that "Petitioner does not seriously challenge the accuracy of [his] assessment of the risk that unwed U.S. citizen mothers would give birth abroad to stateless children," Br.U.S. 33, is half-true: there was a risk, but not demonstrably greater for mothers than fathers.[9]

Petitioner also disputes the Solicitor General's claims that "the only parent legally recognized at the time of [non-marital] birth was the mother," *id.* 32 (citing Sandifer 258 & n.38), and that "the only parent eligible to transmit citizenship *at the time of birth* in a country in which citizenship was based on the citizenship of a parent was the mother." *Id.* 32-33. Sandifer addresses transmission of nationality – explaining both parents of a non-marital child may do so in some countries and are prevented from doing so in others – not which parent is "legally recognized." The government's latter assertion, unsupported but oft-repeated, is incorrect. *Statelessness Scholars* 8-11. The laws of several countries look to fathers of non-marital children to transmit nationality at birth when they are known. *Id.* Thus, the Solicitor General's "critical point" that non-marital children of citizen fathers are "unlikely to be born stateless

---

[9] *Statelessness Scholars* 7-22. Even if mothers' risk was greater, empirical evidence cannot justify the sex-discrimination. *See Craig v. Boren*, 429 U.S. 190, 201-03 (1976).

because the child will have the citizenship of his mother," Br.U.S. 34, is mistaken,[10] precluding a finding that the "at birth" distinction he urges provides even a rational basis for the sex-discrimination here.

The Solicitor General does not explain why Congress would avoid statelessness at birth yet tolerate it arising later, as may occur when a father legitimates yet cannot transmit citizenship due to the residence criteria.[11] Rather, he posits a punitive scheme under which "a legislature may impose consequences on a child based on his father's choice of residence, or his choice[12] of whether to establish paternity." *Id.* at 34-35 (citing *Chin Bow*, 274 U.S. at 669, and *Lehr v. Robertson*, 463 U.S. 248, 264 (1983)). In *Chin Bow*, 274 U.S. at 669, the "consequence[ ]" of denying transmission of citizenship was justified by the father's failure ever to live in the United States. In *Lehr*, the "consequence[ ]" of denial of notice of his child's adoption was justified by Lehr's failures to "establish[ ] a substantial relationship with his daughter," 463 U.S. at 267, or even "mail[ ] a postcard

---

[10] *Statelessness Scholars* 8-15 (identifying scenarios in which a foreign-born, non-marital child would not acquire the mother's nationality).

[11] The Solicitor General's citations, Br.U.S. 24, demonstrating that statelessness is "deplored," *Trop*, 356 U.S. at 102, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), involve post-birth expatriation.

[12] Paternity may be established without "choice," as when the father is merely known. *Statelessness Scholars* 8-11.

to the putative father registry." *Id.* at 264. That "consequences" were employed to further legitimate goals in *Chin Bow* and *Lehr* hardly supplies an "exceedingly persuasive justification" for imposing the "consequence[ ]" of statelessness upon a father's child because the father accepted paternal responsibility by legitimating.

Discouraging acceptance of paternal responsibility contravenes the interests furthered by 18 U.S.C. §1409(a)(4), which *requires* paternal filiation. *Nguyen*, 533 U.S. at 64-70. Congress sought to advance a "profound" governmental interest, *id.* at 67, in ensuring that the father of a potential citizen had the opportunity to form a "relationship . . . that consists of the real, everyday ties that provide a connection between the child and citizen parent and, in turn, the United States." *Id.* at 65. *Accord id.* at 70.

But the Solicitor General claims that Congress also took the opposite tack, and he condemns some fathers who legitimate their non-marital children during minority as "inflict[ing] statelessness" on their children when they legitimate in countries that require transmission of nationality by a known or legitimating father. Br.U.S. 33. Perhaps Congress sought both to promote and discourage legitimation of non-marital children depending upon whether the father had met an age-calibrated residence requirement. But if that is so, then a Congress engaging in that sort of double-think on the merits of paternal filiation has not offered an "'exceedingly persuasive

justification,'" *J.E.B.*, 511 U.S. at 136, for the sex-discrimination here nor even acted rationally.

The Solicitor General also discusses supposed distinctions in other countries' laws regarding transmission of nationality, incorporating again the mistaken assumption that fathers of non-marital children transmit nationality only after birth. Br.U.S. 36-39. He argues that *Nguyen* supports the discrimination here as Congress could have taken into account that mothers of non-marital children are easily identified and "recognized as having a parental relationship with the child by virtue of birth alone. . . ." *Id.* 38 (citing *Nguyen*, 533 U.S. at 62). He asserts that "[i]f that mother is not permitted to transmit her citizenship to her child at that time or at all, her child may be stateless." *Id.*

The Solicitor General's contention is flawed because Congress was not differentiating between *all* potential citizen fathers and mothers of non-marital children when it adopted its discriminatory residence criteria: the relevant population of non-marital fathers under section 1409(a) is those who legitimate during minority. Thus, "potential problems of proof and paternal inaction," *id.*, cannot justify discrimination against fathers who legitimate during minority; they have proof and they have acted. As to those fathers, a mother may not be able to transmit citizenship to their non-marital child or, if she did at one point, citizenship may be lost. *Statelessness Scholars* 8-9. In the Solicitor General's terms, "[i]f that [father] is not permitted to transmit [his] citizenship to [his]

child at that time or at all, [his] child may be stateless." Br.U.S. 38.[13]

The government claims Congress relied upon "the *legal* reality . . . that an unwed mother is established at the time of her child's birth as the child's legal parent while the unwed father usually is not," insisting that the "Court acknowledged that reality in *Nguyen*. . . ." Br.U.S. 39-40 (citing *Nguyen*, 533 U.S. at 63). Rather, *Nguyen* held Congress acknowledged *biological* reality by imposing a legitimation requirement on men: because a father "might not even know of conception," legitimation ensures "some opportunity" for a father/child relationship. 533 U.S. at 66. The residence requirements provide no "reasonable substitute," *id.*, accounting for similar biological differences. Thus, *Nguyen* provides no support for elevating "legal reality" – itself derived from stereotypes[14] – to the level of the neutral, immutable biological realities that informed that decision. Providing beneficial treatment to women because they are denominated the "legal parent," by discriminatory, patriarchal systems of other nations, advances no legitimate

---

[13] The Solicitor General observes it is less likely today for a child to lose the mother's nationality as a consequence of subsequent paternal legitimation. Br.U.S. 35. That is no "exceedingly persuasive justification" for discriminating in 1940 and 1952. Even today, non-marital children of citizen fathers risk statelessness. *Statelessness Scholars* 8-11.

[14] *See id.* at 91-92 (O'Connor, J., dissenting).

interest. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003).

Nor was Congress faced with a unitary "legal reality"; it was (and is) also a "legal reality" that non-marital children of fathers who legitimate during minority risked statelessness. There is no "exceedingly persuasive justification" for ignoring that "legal reality."

Finally, Petitioner does not argue the Constitution requires elimination of all statelessness. Br.U.S. 40-42. The scheme denies equal protection because disparate levels of protection against statelessness turn on parental gender. The protection provided women is not complete, and Petitioner's father asks for no better. *See Califano v. Westcott*, 443 U.S. 76, 89 (1979) ("Congress may not legislate 'one step at a time' when that step is drawn along the line of gender. . . .").[15]

---

[15] It is no more equal treatment to insist that non-marital children of men seek secondary routes to citizenship, *see* Br.U.S. 42-44, while non-marital children of women are granted citizenship at birth, than it was to offer one high-quality university to men and an inferior one to women in *Virginia*, 518 U.S. at 553.

IV. THE PROPER REMEDY IS EXTENSION TO NON-MARITAL FATHERS ONLY.

The Solicitor General urges prospective nullification[16] of the residence requirement applicable to women, Br.U.S. 45-51, acknowledging that retrospective nullification would be improper because "[o]nce citizenship is properly conferred, Congress ordinarily may not take it away." *Id.* 48. But his proposed remedy is equally improper because every right must have a remedy, *Marbury v. Madison*, 5 U.S. 137, 163 (1803), and prospective nullification provides no relief for those injured by the 1940 and 1952 Acts. *See Welsh v. United States*, 398 U.S. 333, 362-64 (1970) (Harlan, J., concurring).[17] Transmission of citizenship by non-marital fathers in the future is subject to different legislation, not before the Court. *See* Immigration and Nationality Act Amendments of 1986, Pub.L. 99-653, §12, 100 Stat. 3655, 3657.

---

[16] No case supports this proposed non-remedy. Br.U.S. 51. *Heckler v. Mathews* is inapposite as Congress expressly preferred nullification over extension, 465 U.S. 728, 739 n.5 (1984), and *Mathews* found an "exceedingly persuasive justification" supported Congress's limited re-institution of a gender-biased scheme. *Id.* at 746. Significantly, Mathews was not left remediless: he could seek "withdrawal of benefits from the favored class," *id.* at 740, yet the citizenship "benefit" cannot be withdrawn. Br.U.S. 51.

[17] If prospective relief is granted, the conviction cannot stand as, contrary to Respondent's claim, Br.U.S. 52, the constitutional violation is not cured. *Welsh*, 398 U.S. at 362-63 (Harlan, J., concurring) (citing *Iowa Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931)).

Indeed, extension, not nullification, is the preferred course, and "a strong severability clause . . . counsels against nullification." *Westcott*, 443 U.S. at 89-90. "[T]he choice between extension and nullification is within the constitutional competence of a federal court. . . ." *Mathews*, 465 U.S. at 739 n.5 (quotations omitted), and while the Solicitor General contends that "Congress is best positioned to structure the balance between the possibility of statelessness and appropriate limits on naturalizing aliens," Br.U.S. 46, Congress may invoke "the constitutional competence" described in *Mathews* and did so in the severability clause.[18]

The Solicitor General argues that extension "would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States." *Id.* 48. But the Solicitor General offers no evidence that the number of beneficiaries is large, and discounts the strong likelihood that non-marital children of citizen fathers claiming citizenship under section 1409 will have strong U.S. ties. Only children legitimated during minority could claim citizenship at birth, ensuring proof of "a biological parent-child relationship," *Nguyen*,

---

[18] *INS v. Pangilinan*, 486 U.S. 875 (1988) and *United States v. Ginsberg*, 243 U.S. 472 (1917), Br.U.S. 47, are inapposite as involving naturalization of aliens, not citizenship at birth, and do not consider a severance clause. Petitioner, unlike Pangilinan, does not invoke "equitable" relief.

533 U.S. at 62-64, and an "opportunity for a tie between citizen father and foreign born child." *Id.* at 66.[19] Because legitimation is often accomplished by an affirmative paternal act, extension could provide greater evidence of a parent-child connection when the parent is a father.

A. Because Custodial Fathers of Non-Marital Children Are Equally Adept at Inculcating American Values, Extension Is Proper.

"[T]his Court has often concluded that, in the absence of legislative direction *not* to sever the infirm provision, 'extension, rather than nullification,' of a benefit is more faithful to the legislative design." *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting) (quoting *Westcott*, 443 U.S. at 89-90) (additional citations omitted). Because the actual purpose of the residence requirement was to "ensure[ ] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship," Br.U.S. 31, not to avoid statelessness, Pet.Br. 35-38, and, *supra*, 4-12, extension is the proper remedy as it is consistent with the "legislative design" of "ensuring . . . a sufficient connection

---

[19] Current law imposes additional requirements upon non-marital fathers. *See* 8 U.S.C. §§1409(a)(1) (clear and convincing evidence of "a blood relationship between the person and the father"), and (a)(3) (agreement to provide financial support while the child is under 18).

to the United States. . . ." Br.U.S. 31. Because fathers of non-marital children are similarly situated to mothers as to that connection, one year's residence is sufficient connection for both.

Sex discrimination cannot be based upon "over-broad generalizations," *see Virginia*, 518 U.S. at 533, yet the discriminatory scheme here is based on precisely that, Congress's "assumption that the citizen mother would probably have custody." *Miller*, 523 U.S. at 430 n.8 (Op. of Stevens, J.). While the facts of Petitioner's case make it clear that the stereotype is not always accurate, even empirical support for the assumption "cannot suffice to justify the denigration of the efforts of [men] who do [raise their non-marital children as single parents]." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). *Accord Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 151 (1980).

Because both mothers and fathers may raise their non-marital children in single citizen-parent households without foreign influence, extending the benefit to fathers of non-marital children will not "disrupt[ ] the statutory scheme" that was designed to ensure an American background despite the influence of a foreign parent. *See Welsh*, 398 U.S. at 365 (Harlan, J., concurring). *Accord Mathews*, 465 U.S. at 739 n.5. Extension is consistent with the Court's general rule in favor of that remedy, *Westcott*, 443 U.S. at 89, and avoids burdening "the innocent recipients of government largesse," *id.* at

90, unlike the government's proposed remedy of prospective nullification of section 1409(c).[20]

B. Fathers of Non-Marital Children, Not Parents In Mixed Nationality Marriages, Are Similarly Situated to Unwed Mothers As to Both Statelessness Risks And Lack Of Foreign Influence.

If avoiding statelessness was Congress's genuine motivation for the sex discrimination, that would, in the Solicitor General's view, require the Court to consider Congress's balance of avoiding of statelessness with limiting acquisition of citizenship at birth. Br.U.S. 46. If that balance informs the Court's analysis of "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional," *see Welsh*, 398 U.S. at 355-56 (Harlan, J., concurring), it supports extension.

Fathers of legitimated non-marital children are similarly situated to mothers of non-marital children as to both factors specified by the Solicitor General. Fathers of non-marital children, like mothers, run the (conceded) risk that their offspring will be stateless. *Respondent's Brief*, *Nguyen v. INS*, 2000 WL 1868100,

---

[20] Because parents in mixed-nationality marriages are not similarly situated to single, citizen-parents, relief would not extend to them.

*18 n.9. Similarly, when citizen fathers raise non-marital children, those families, like their maternally headed counterparts, are less subject to foreign influence, making an American upbringing likely. A Congress that wished to avoid statelessness of the non-marital children of its citizens, and which did not entertain a stereotypical view that mothers, not fathers, raise non-marital children, would plainly prefer extension to non-marital fathers over frustration of its efforts to benefit similarly situated mothers. *See Westcott*, 443 U.S. at 90 ("[A] strong severability clause ... evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse.").

The Solicitor General suggests that if the Court grants relief to fathers of non-marital children, it effectively must grant relief to married, mixed-nationality fathers because he believes that the "risk [of statelessness] is even greater with respect to the children of *married* citizen fathers, because such children are legitimate from birth." Br.U.S. 50. Post-*Nguyen*, the relevant comparison is between fathers who legitimate during minority and mixed-nationality fathers, and there is no evidence of any difference in the risk of statelessness suffered by children of these categories of fathers.

But assuming the risk of statelessness is comparable, the other consideration identified by the Solicitor General, Br.U.S. 46, is not. Fathers in mixed-nationality marriages are not similarly situated to

citizen fathers or mothers of non-marital children because of the foreign influence associated with the alien spouse. Thus, contrary to the Solicitor General's suggestion, *id.* 50, a grant of relief to unwed fathers does not guarantee relief to fathers in mixed-nationality marriages. Still less does it guarantee relief to mothers in such marriages, *see id.*, as they are neither similarly situated to parents of non-marital children as to risk of statelessness nor as to the question of foreign influence on the upbringing of children. The Solicitor General's dire warning of "the exception swallow[ing] the rule," *id.* 49, is not well-taken.

C. The Court May Strike the Inordinate and Unnecessary Restriction On Younger Fathers.

The Court may "sever [a statute's] problematic portions while leaving the remainder intact." *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). The Solicitor General rejects, however, Petitioner's suggestion that the Court sever application of the requirement of 5 years' residence after age 14, largely because it would not fully remedy the constitutional violation Petitioner urges. Br.U.S. 52. *Nguyen* found it significant that the burden placed on the citizen-father there was "minimal," demonstrating "that Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives." 533

U.S. at 70-71. Not so here: Petitioner's father, who satisfied the residence criterion, was precluded, due to age, from transmitting citizenship despite legitimating and raising his son. The Court should strike application of the age bar as denying equal protection.

V. PETITIONER HAS STANDING

The Solicitor General claims Petitioner lacks standing because his father could have protected his own rights in another proceeding. Br.U.S. 11-13. He disregards the Court's "quite forgiving" approach in allowing *jus tertii* standing "when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights," *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quotation omitted), and misinterprets what constitutes "a 'hindrance' to the possessor's ability to protect his own interest." *Id.*

Because sections 1401 and 1409 "impose[ ] legal duties and disabilities," *Craig*, 429 U.S. at 196, upon Petitioner, and "the continued enforcement of [the statutes] will 'materially impair the ability of' [citizen fathers to transmit citizenship to non-marital, foreign-born children] despite their classification by an overt gender-based criterion," *id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972)), Petitioner is the "least awkward challenger" and "obvious claimant." *Id.* at 197. Thus, as in *Craig*, Petitioner has "standing to raise relevant equal protection

challenges to [the] gender-based law." *Id.* *See also* *Miller*, 523 U.S. at 433 (Op. of Stevens, J.) (third-party standing met "because her claim relies heavily on the proposition that her citizen father should have the same right to transmit citizenship as would a citizen mother"); *id.* at 454 n.1 (Scalia, J., concurring) (accepting third-party standing citing *Craig*); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (firm had standing to invoke rights of client although client "suffers none of the obstacles discussed in [*Singleton v. Wulff*, 428 U.S. 106 (1976)] to advancing his own constitutional claim").

The Solicitor General does not contest the *Craig/Kowalski* "forgiving" approach. Instead, he posits that Petitioner's father "could have" sought to protect his own rights. Br.U.S. 12-13. But the Court requires only "some hindrance to the third party's ability to protect his or her own interest." *Powers v. Ohio*, 499 U.S. 400, 411-415 (1991). The conceded inability to intervene in this criminal case, Br.U.S. 12, plainly constitutes "some hindrance." *Powers*, 499 U.S. at 411 ("These criteria [including "some hindrance"] have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties."); *id.* at 414 (finding "some hindrance" because "jurors are not parties to the jury selection process and have no opportunity to be heard. . . ."). *See also Brief for the National Immigration Justice Center and the American Immigration Lawyers Association as Amici Curiae* ("*NIJC/AILA*") 29 & n.13.

Moreover, other accepted "practical barriers to suit," *Powers*, 499 U.S. at 415, such as "economic burdens of litigation," a "small financial stake," *id.*, privacy concerns, *see Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 n.4 (1977), and other procedural obstacles, all constitute "some hindrance" to a non-marital father's ability to protect his rights. Pursuing litigation produces no economic benefit, raises privacy concerns (potentially subjecting the child to removal or prosecution), and would also interfere with Congress's procedure for the administration of removal proceedings. *See NIJC/AILA* 30-31. Thus, the father of a non-marital, foreign-born child has "little incentive to set in motion the arduous process needed to vindicate his own rights." *Powers*, 499 U.S. at 415.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

REUBEN CAMPER CAHN
STEVEN F. HUBACHEK*
ELIZABETH M. BARROS
VINCENT J. BRUNKOW
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California
92101-5008
Telephone: (619) 234-8467
Steven_Hubachek@fd.org

*Counsel of Record

AMICUS CURIAE BRIEF

No. 09-5801

IN THE

Supreme Court of the United States

RUBEN FLORES VILLAR,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF PETITIONER

LUCAS GUTTENTAG
JENNIFER CHANG NEWELL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

DAVID BLAIR-LOY
SEAN RIORDAN
ACLU OF SAN DIEGO AND IMPERIAL COUNTIES
PO Box 87131
San Diego, California 92138
(619) 232-2121

SANDRA S. PARK
Counsel of Record
STEVEN R. SHAPIRO
LENORA M. LAPIDUS
LEE GELERNT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500
spark@aclu.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. HEIGHTENED SCRUTINY IS THE PROPER STANDARD OF EQUAL PROTECTION REVIEW 7

A. The Court Need Not Decide Whether The Plenary Power Doctrine Limits the Level of Equal Protection Scrutiny Because This Case Involves Birthright Citizenship 8

1. Statutory Citizenship At Birth Does Not Involve Immigration Or Naturalization 8

2. The Court Has Never Extended The Plenary Power Doctrine To Citizenship at Birth 11

B. Heightened Scrutiny Is The Proper Standard Even If The Court Were To View Birthright Citizenship As A Traditional Immigration And Naturalization Issue 14

II. THE GENDER-BASED RESIDENCY REQUIREMENTS DO NOT SURVIVE HEIGHTENED SCRUTINY 18

TABLE OF AUTHORITIES

Cases

Afroyim v. Rusk, 387 U.S. 253 (1967) 8

Boumediene v. Bush,
553 U.S. 723, 128 S. Ct. 2229 (2008) 15

Califano v. Goldfarb, 430 U.S. 199 (1977) 19

Califano v. Westcott, 443 U.S. 76 (1979) 9, 27

Craig v. Boren, 429 U.S. 190 (1976) 19, 26

Fiallo v. Bell, 430 U.S. 787 (1977) ..... *passim*

Frontiero v. Richardson,
411 U.S. 677 (1973) 19, 26

INS v. Chadha, 462 U.S. 919 (1983) 15

INS v. St. Cyr, 533 U.S. 289 (2001) 15

J.E.B. v. Alabama ex. rel. T.B.,
511 U.S. 127 (1994) 16, 18, 19

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 8

Landon v. Plasencia, 459 U.S. 21 (1982) 15

Miller v. Albright, 523 U.S. 420 (1998) ..... *passim*

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) 16, 18

Nevada Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 16, 18

Nguyen v. INS, 533 U.S. 53 (2001) ..... *passim*

Orr v. Orr, 440 U.S. 268 (1979) 26

Reed v. Reed, 404 U.S. 71 (1971) 27

Rogers v. Bellei, 401 U.S. 815 (1971) 11

Trop v. Dulles, 356 U.S. 86 (1958) 14

United States v. Virginia,
518 U.S. 515 (1996) ..... *passim*

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 18, 25, 27

Wengler v. Druggists Mut. Ins. Co.,
446 U.S. 142 (1980) 26

Zadvydas v. Davis, 533 U.S. 678 (2001) 6, 15

Constitution and Statutes

U.S. Const. art. II, § 1, cl.5 10

8 U.S.C. § 1101(a)(23) 9

8 U.S.C. § 1326 3

8 U.S.C. § 1401(a) 10

8 U.S.C. § 1401(a)(7) (1970) ..... *passim*

8 U.S.C. § 1401(b) 10

8 U.S.C. § 1401(f) 10

8 U.S.C. § 1401(g) 5

8 U.S.C. § 1402 10

8 U.S.C. § 1403 10

8 U.S.C. § 1409(a) (1970) 3

8 U.S.C. § 1409(a) 5, 9

8 U.S.C. § 1409(c) (1970) 2, 3

8 U.S.C. § 1409(c) 5

Nationality Act of 1940, ch. 876, 54 Stat. 1138-1139 (repealed 1952) 22

Immigration and Nationality Act, ch. 477, Title III, ch. 1, 66 Stat. 235-236 (1952) 22

Immigration and Nationality Act, Pub. L. No. 99-653, 100 Stat. 3657 (1986) 5

Other Authorities

Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968) 10

Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669 (2000) 22

Office of Child Support Enforcement, FY 2008 Preliminary Report (2009) 24

S. Rep. 1137, 82d Cong., 2d Sess. 39 (1952) 23

U.S. Br., *Nguyen v. INS*, 2000 WL 1868100 (5th Cir. 2000) (No. 99-2071) 21

U.S. Census Bureau, America's Families and Living Arrangements: 2007 (2009) 24

U.S. Census Bureau, Current Population Reports, Household and Family Characteristics: March 1995 (1996) 24

U.S. Dep't of Health and Human Serv., Charting Parenthood: A Statistical Portrait of Fathers and Mothers in America (2002) 24

STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU of San Diego & Imperial Counties is a regional affiliate of the national ACLU.

The ACLU has appeared before this Court in numerous equal protection cases as both direct counsel and *amicus curiae*, including *Miller v. Albright*, 523 U.S. 420 (1998), and *Nguyen v. INS*, 533 U.S. 53 (2001). Through its Women's Rights Project, the ACLU has litigated many cases concerning constitutional challenges to gender-based classifications. The ACLU's Immigrants' Rights Project engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

---

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members or its counsel made a monetary contribution to this brief's preparation or submission.

STATEMENT OF THE CASE

Petitioner Ruben Flores-Villar was born in Mexico in 1974. *U.S. v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008). His father, a U.S. citizen, brought the Petitioner to the U.S. when he was only two months old, legally acknowledged paternity, and raised him in this country. *Id.* Petitioner's mother, a foreign national, took no part in his upbringing. Pet'r Br. at 2, 8.

At the time of the Petitioner's birth, the following provisions governing statutory birthright citizenship were in force:

8 U.S.C. § 1401(a)(7) (1970) (emphasis added)

> (a) The following shall be nationals and citizens of the United States at birth:
>
> > (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, *at least five of which were after attaining the age of fourteen years* . . .

8 U.S.C. § 1409(c) (1970) (emphasis added)

> (c) Notwithstanding the provision of subsection (a) of this section, a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of

> his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions *for a continuous period of one year.*

The statute thus imposes disparate requirements on U.S. citizen fathers and mothers for the transmission of citizenship to children born out of wedlock. A mother needs to have been present in the U.S. for a period of only one year, any time before the child's birth, in order to transmit citizenship. 8 U.S.C. § 1409(c) (1970). On the other hand, a father must legitimate the child while he or she is under the age of 21 and must have resided in the U.S. for a period of ten years before the child's birth, at least five of which were after the father was 14 years old. 8 U.S.C. §§ 1401(a)(7), 1409(a) (1970).

The Petitioner's father legitimated his son and resided in the U.S. for more than ten years prior to Petitioner's birth. However, he could not meet the five-year prong of the residency requirement because he was 16 years old when Petitioner was born (and the five years must accrue after the father turns 14). Pet'r Br. at 1.

After he was charged in 2006 with illegally reentering the U.S. in violation of 8 U.S.C. § 1326, Petitioner sought to raise a citizenship defense. Pet'r Br. at 3. However, his application for a Certificate of Citizenship was denied. The government stated:

> The fact of your legitimation is not in question. . . . Since your father was only

> sixteen at the time of your birth, *it is physically impossible for him to have [the] required physical presence necessary (five years after age fourteen)* in order for you to acquire United States citizenship through him.

Id. (emphasis added).

The Petitioner challenged the gender-based residency requirements on equal protection grounds in his criminal prosecution. The trial court upheld the law under both heightened scrutiny and rational basis review. *U.S. v. Flores-Villar*, 497 F. Supp. 1160, 1164 (S.D. Cal. 2007). The Court of Appeals affirmed. The Ninth Circuit assumed without deciding that heightened scrutiny applied, and found that the gender classification substantially furthered the important governmental interest in "[a]voiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen." 536 F.3d at 996.

SUMMARY OF ARGUMENT

At issue in this case are gender-based residency requirements that absolutely bar some U.S. citizen fathers from transmitting citizenship to their children. If Petitioner's mother had been a U.S. citizen with the same history of residency in the United States as his father, Petitioner would be a citizen today. Instead, the law makes it literally impossible for Petitioner's father to transmit citizenship to his son.

Amici submit this brief to address two points regarding the applicable level of equal protection scrutiny. First, the Court should apply heightened scrutiny, as it ordinarily does in gender discrimination cases, and should reject the government's request for a more deferential standard of review based on the plenary power doctrine. Second, in invalidating the law, this Court should correct the Court of Appeals' misapplication of the heightened scrutiny standard by making clear that the Ninth Circuit failed to require a sufficiently substantial fit between the gender-based classification and the governmental interest, and failed to require a sufficiently persuasive justification for relying on gender as a proxy.

1. Under this Court's precedents, former 8 U.S.C. §§ 1401(a)(7) and 1409 are subject to heightened scrutiny because they facially discriminate on the basis of gender.[2] The government contends, however, that heightened scrutiny is the wrong standard because this case involves Congress's plenary power over immigration and argues that the Court should therefore apply a more deferential standard, as the Court has done in

---

[2] These provisions were amended in 1986. Immigration and Nationality Act, Pub. L. 99-653, 100 Stat. 3657 (1986). Because Petitioner was born before the amendments, the former 8 U.S.C. §§ 1401(a)(7) and 1409 are applicable. Under the current version of the statute, fathers of children born out of wedlock must have five years of total residency, with at least two years occurring after the age of 14 years old, in order to transmit citizenship. 8 U.S.C. §§ 1401(g), 1409(a) (2010). Mothers must have one continuous year of residency prior to the child's birth. 8 U.S.C. § 1409(c) (2010).

immigration cases such as *Fiallo v. Bell*, 430 U.S. 787 (1977). Cert. Opp. at 11. But here, birthright citizenship is at issue, and not Congress's traditional immigration or naturalization powers. *Amici* are not aware of any case in which the Court has applied the plenary power doctrine in a case involving birthright citizenship.

Even assuming, however, that the Court were to view birthright citizenship as falling within the scope of Congress's immigration powers, the Court should nonetheless apply heightened scrutiny, and not the deferential standard of review applied in *Fiallo*. Since *Fiallo*, the Court has rejected attempts to shield congressional action on immigration matters from meaningful judicial scrutiny. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (detention). More particularly, since *Fiallo* was decided, this Court has made unequivocally clear, in numerous cases, that heightened scrutiny should be applied whenever laws explicitly discriminate on the basis of gender. Consequently, at least in immigration cases involving discrimination on the basis of gender, the Court should apply heightened scrutiny. Whether the plenary power doctrine should be discarded altogether in light of modern developments is not an issue that need be addressed, as this case unquestionably involves an explicit gender-based classification.

2. Once former 8 U.S.C. §§ 1401(a)(7) and 1409 are analyzed under this Court's precedents on heightened scrutiny, it is clear they fail to meet that demanding standard. The government has not demonstrated that the gender classification is

substantially related to an important governmental interest. Rather than reducing statelessness for children of U.S. citizen parents, the differential residency requirements exacerbate the risk that children of U.S. citizen fathers will be rendered stateless simply because of the sex of their U.S. citizen parent. The law violates the right to equal protection by creating an insurmountable hurdle to citizenship transmission for some fathers and cannot be justified as a beneficent allowance to U.S. citizen mothers.

ARGUMENT

I. HEIGHTENED SCRUTINY IS THE PROPER STANDARD OF EQUAL PROTECTION REVIEW.

Amici agree with Petitioner that Congress's plenary power over immigration matters does not justify reducing the level of equal protection scrutiny applicable here. Pet'r Br. at 15-19. Statutory citizenship at birth is not an immigration or naturalization matter, and this Court has never applied the plenary power doctrine to birthright citizenship laws. Thus, because immigration is not at issue here, the Court need not decide whether Congress's plenary power over immigration and naturalization would otherwise alter the level of scrutiny. But, even if birthright citizenship were deemed to be within the scope of Congress's plenary immigration power, the Court should nonetheless hold, consistent with its post-*Fiallo* precedents, that heightened scrutiny applies where Congress explicitly legislates on the basis of gender.

A. The Court Need Not Decide Whether The Plenary Power Doctrine Limits The Level Of Equal Protection Scrutiny Because This Case Involves Birthright Citizenship.

1. Statutory Citizenship At Birth Does Not Involve Immigration Or Naturalization.

Congress's conferral of citizenship at birth to children born abroad to citizen parents is fundamentally distinct from the regulation of immigration. At its core, the immigration power pertains to Congress's authority to exclude persons for whom it recognizes no present claim to citizenship, or even entry. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners . . . ."); *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting) ("The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place.").

In contrast, this case concerns the right of a U.S. citizen to transmit his citizenship to his citizen or putative citizen child based on a significant familial connection. It is beyond dispute that citizenship is an important and unique right. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (recognizing that the right of citizenship is "a most precious right"); *see also Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do

so under the name of one of its general or implied grants of power. . . . [The] citizenry is the country and the country is its citizenry."). While Congress may generally restrict the conferral of *jus sanguinis* citizenship by statute, Congress's determinations in this regard must satisfy constitutional standards, including equal protection.[3]

Similarly, although citizenship through naturalization rests upon proven ties to the country, it is legally distinct from statutory citizenship at birth. Naturalization involves acquisition of a new status that begins only when naturalization is complete. *See* 8 U.S.C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person *after* birth, by any means whatsoever.") (emphasis added).

Statutory citizenship at birth constitutes recognition of a status created at the time of the child's birth by virtue of the child's parentage. If the conditions for statutory citizenship at birth are met, that existing status is recognized. *See* 8 U.S.C. § 1409(a) (acknowledging citizenship "as of the date of birth"); *see also Miller*, 523 U.S. at 432 (Stevens, J.) (explaining that a judgment in Miller's favor would "confirm [the petitioner's] pre-existing citizenship

---

[3] Even where the government acts through statute to grant rights that it is under no constitutional mandate to grant, it may not do so in a discriminatory manner. *See, e.g., Califano v. Westcott*, 443 U.S. 76, 85 (1979) (prohibiting discriminatory distribution of Aid to Families With Dependent Children even though benefits granted by statute).

rather than grant her rights that she does not now possess").[4]

Statutory citizenship at birth thus does "not involve the transfer of loyalties that underlies the naturalization of aliens." *Miller*, 523 U.S. at 478 (Breyer, J., dissenting); *see also id.* at 481 ("[T]he statutes that automatically transfer American citizenship from parent to child 'at birth' differ significantly from those that confer citizenship on those who originally owed loyalty to a different nation."). Perhaps in light of these distinctions between naturalized citizens and "natural born" citizens, the Framers chose to disqualify naturalized citizens from serving as President or Vice President. U.S. Const. art. II, § 1, cl. 5.[5]

---

[4] The Immigration and Nationality Act contains several categories of citizens at birth, including some categories not based on any relationship to a citizen parent. In addition to the type of citizenship at issue here, the categories of birthright citizenship include persons born in the United States to a member of an American Indian or other native tribe (8 U.S.C. § 1401(b)), children of unknown parentage found in the U.S. (8 U.S.C. § 1401(f)), persons born in Puerto Rico (8 U.S.C. § 1402), and persons born in the Panama Canal Zone (8 U.S.C. § 1403), as well as persons born in the U.S. who are subject to U.S. jurisdiction (8 U.S.C. § 1401(a)).

[5] While there has been no shortage of debate on the question, most commentators take the view that statutory citizens at birth are eligible, as "natural born" citizens, to serve as President or Vice President under the Qualifications Clause. *See, e.g.*, Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968).

2. The Court Has Never Extended The Plenary Power Doctrine To Citizenship At Birth.

So far as we have been able to determine, this Court has never exempted birthright citizenship determinations from ordinary constitutional analysis, much less held that heightened scrutiny would not apply if such determinations were based on explicit gender classifications. *See Miller*, 523 U.S. at 480 (Breyer, J., dissenting) ("The Court to my knowledge has never said, or held, or reasoned that statutes automatically conferring citizenship 'at birth' upon the American child of American parents receive a more lenient standard of review."); *see also Nguyen*, 533 U.S. at 97 (O'Connor, J., dissenting) ("Because §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply.").

In *Rogers v. Bellei*, 401 U.S. 815 (1971), for example, the Court scrutinized a statute governing citizenship at birth under ordinary constitutional standards. In that case, the foreign-born plaintiff child of a U.S. citizen mother challenged the five-year residency requirement then imposed on such children who wished to claim statutory citizenship at birth. In upholding the residency requirements, the Court did not treat the plaintiff as an alien without standing to raise such constitutional arguments, nor did it lower the standard of review based on the plenary power doctrine. Rather, the Court acknowledged that Bellei was a citizen for purposes of his claim until such time as the Court determined

that he had failed to meet any conditions lawfully placed on his citizenship by Congress. *See id.* at 827 (noting plaintiff's claim to "continuing" citizenship). *Accord Nguyen*, 533 U.S. at 96-97 (O'Connor, J., dissenting) ("A predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens. But whether that predicate obtains is the very matter at issue in this case."); *see also Miller*, 523 U.S. at 433 n.10 (Stevens, J.).

Nor did the Court in *Bellei* simply defer to Congress's judgment as to what conditions to place on statutory citizenship at birth. Instead, the Court satisfied itself that the congressional scheme reflected "careful consideration," and was "purposeful, not accidental." 401 U.S. at 833. In the absence of a classification requiring heightened review (the statute there was gender-neutral), the Court exercised rational basis review, holding that while the residency requirement "may not be the best that could be devised . . . we cannot say that it is irrational or arbitrary or unfair." *Id.* Critically, the Court did not apply a more deferential standard of review pursuant to the plenary power doctrine.

Here, however, the Court of Appeals relied on *Fiallo* in concluding that the gender-based provisions at issue must be assessed in light of "the virtually plenary power that Congress has to legislate in the area of immigration and *citizenship*." *Flores-Villar*, 536 F.3d at 996 (citing *Fiallo*, 430 U.S. 791-93) (emphasis added). Yet unlike this case, *Fiallo* did not involve a citizenship claim, much less a birthright citizenship claim.

In *Fiallo*, three sets of unwed natural fathers and their children each sought a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent. Rather than employ full-fledged constitutional scrutiny, this Court deferred to Congress's plenary power in setting immigration policy, examining only whether the challenged statute was based on a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794. Thus, because *Fiallo* involved immigration benefits, it does not resolve the appropriate level of equal protection scrutiny where Congress draws explicit gender-based lines in the context of *birthright* citizenship. *See, e.g.*, *Miller*, 523 U.S. at 429 (Stevens, J.) (*Fiallo* "involved the claims of several aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen."); *see also id.* at 432-33; *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting) ("*Fiallo* . . . is readily distinguished. *Fiallo* involved constitutional challenges to various statutory distinctions, including a classification based on the sex of a United States citizen or lawful permanent resident, that determined the availability of a special immigration preference to certain aliens by virtue of their relationship with the citizen or lawful permanent resident.").

Congress's decisions regarding the identity of our citizenry must not be permitted to be infected with discrimination that is tolerated neither by our legal system nor our society in other contexts. As Justice Breyer cautioned in *Miller*, applying a "specially lenient" standard to statutory citizenship

at birth would mean that such statutes "could discriminate virtually free of independent judicial review." 523 U.S. at 478 (Breyer, J., dissenting). *Cf. Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion) (holding that a statute stripping military deserters of U.S. citizenship was unconstitutional, and observing that "[w]hen it appears that an Act of Congress conflicts with [a constitutional] provision[], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.").

For centuries, Congress has recognized that birth to a United States citizen is a sufficiently strong tie to this country to make a child eligible for citizenship at birth. Because this case involves birthright citizenship, heightened scrutiny is the appropriate standard of review. The Court need not determine, therefore, whether the plenary power doctrine would otherwise dictate a more deferential standard of review if this were a traditional immigration or naturalization case.

B. Heightened Scrutiny Is The Proper Standard Even If The Court Were To View Birthright Citizenship As A Traditional Immigration And Naturalization Issue.

Even if the Court were to conclude that birthright citizenship is an immigration and naturalization issue, heightened scrutiny is nonetheless the applicable standard. As an initial matter, the Court's recent immigration precedents have taken a more measured approach to the plenary

power doctrine than suggested by the government in this case. Indeed, since *Fiallo*, the Court has been increasingly reluctant to insulate immigration legislation from searching constitutional scrutiny. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 32-35, 37 (1982) (holding that exclusion procedures for lawful permanent residents returning from brief trips abroad must comply with due process); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (invalidating a provision authorizing one house of Congress to veto a decision by the Executive to grant relief from deportation, stating that although "[t]he plenary authority of Congress over aliens . . . is not open to question," the Court must inquire into "whether Congress has chosen a constitutionally permissible means of implementing that power"); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (rejecting government's argument that the plenary power doctrine justified an expansive construction of statute authorizing immigration detention, emphasizing that a "statute permitting indefinite detention of an alien would raise a serious constitutional problem"); *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (construing provision of immigration statute to avoid Suspension Clause concerns); *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2262 (2008) (holding that statute applicable to noncitizens detained at Guantanamo was unconstitutional, stating that "[i]f the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause").

The Court's recent measured approach to the plenary power doctrine is appropriate given the extraordinary nature of the doctrine. But the Court need not decide in this case whether the plenary power doctrine should generally be discarded or tempered in all immigration contexts, because this case involves discrimination on the basis of gender. At least in such cases, the Court ought to apply ordinary constitutional standards of review, and reject the outdated *Fiallo* approach.

Rejecting the *Fiallo* approach in this case is especially appropriate in light of this Court's post-*Fiallo* gender precedents. Indeed, it was after *Fiallo* was decided that this Court issued its "pathmarking decisions" instructing that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citation omitted). Both *Virginia* and the "pathmarking decisions" it cited, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), were handed down after *Fiallo*.

In particular, *J.E.B.* emphasized in categorical terms that "[the] long and unfortunate history of sex discrimination" in this country "warrants the heightened scrutiny we afford *all* gender-based classifications today." 511 U.S. at 136 (emphasis supplied). And since that time, the Court has continued to make clear that heightened scrutiny is the proper standard whenever laws are drawn in explicitly gender-based terms. *See, e.g., Nevada*

Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

To allow gender discrimination to exist in one area of the law damages the entire fabric of the Court's equal protection jurisprudence and perpetuates the harms that jurisprudence seeks to eliminate. *See, e.g.*, *Nguyen*, 533 U.S. at 83 (O'Connor, J., dissenting). It also sounds a powerfully negative message that the Nation's highest institutions do not truly believe that unequal treatment on the basis of gender is *always* intolerable. *Id.* at 74.

As the Court has repeatedly made clear, the purpose of applying heightened scrutiny is to ensure that the Court can flush out instances where the legislature has relied on antiquated views: "[T]his Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.'" *J.E.B.*, 511 U.S. at 135 (citations omitted).

In sum, the Court should reject the government's request for deferential review and should apply heightened scrutiny because this case involves birthright citizenship laws that are based on explicit gender classifications. Indeed, the logical consequence of the government's argument is that the plenary power doctrine would not only dictate a deferential standard of review in gender cases, but

also where Congress enacted legislation based on the most rank racial stereotypes. At this stage in the country's history, the Court should not endorse the government's position.

II. THE GENDER-BASED RESIDENCY REQUIREMENTS DO NOT SURVIVE HEIGHTENED SCRUTINY.

Heightened scrutiny is the requisite standard for all cases involving laws that explicitly discriminate based on sex. Once heightened scrutiny is correctly applied, the disparate residency requirements in § 1409 cannot survive constitutional challenge. *See Hibbs*, 538 U.S. at 728; *Virginia*, 518 U.S. at 532-33; *see also J.E.B.*, 511 U.S. at 135; *Hogan*, 458 U.S. at 723-24.

While purporting to apply heightened scrutiny, the Ninth Circuit departed sharply from this Court's precedents. The framework for analyzing gender-based equal protection challenges is well-established. An "exceedingly persuasive justification . . . must be the solid base for any gender-defined classification." *Virginia*, 518 U.S. at 546. "The State must show at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 532. An equal protection violation can occur even when empirical evidence might suggest that there is some correlation between gender and the trait for which it is serving as a proxy. *J.E.B.*, 511 U.S. at 139 n.11; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975);

Craig v. Boren, 429 U.S. 190, 202 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (plurality opinion). Central to the analysis is whether the treatment of the different groups of men and women created by the classification furthers the governmental interest. *See Califano v. Goldfarb*, 430 U.S. 199, 215 (1977) (noting that Congress had not given any attention to the specific case of nondependent widows and their need of benefits when striking down a federal law that granted benefits to all widows but only to dependent widowers). The state's burden is "demanding," and the justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533.

Gender classifications warrant heightened scrutiny because "[w]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform." *Frontiero*, 411 U.S. at 686. To tolerate a gender-based classification unsupported by an exceedingly persuasive justification would violate a core constitutional principle: "At the heart of the constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring).

This Court's equal protection jurisprudence mandates a much more skeptical inquiry into the fit between a gender classification and the asserted governmental interest than the Ninth Circuit's

decision reflects. Viewed through the proper constitutional lens, the fit here is far too tenuous to satisfy heightened scrutiny.

The government argues, and the court below found, that § 1409 represents a tailored response to the risk of statelessness faced by non-marital children born abroad to U.S. citizen mothers. That conclusion is wrong on numerous grounds.

First, the problem of statelessness is not confined to the non-marital children of U.S. citizen mothers. It exists for the non-marital children of U.S. citizen fathers as well. Under heightened scrutiny, the government faces a heavy burden of showing why a problem faced by both men and women should be addressed by a statute that differentiates based on gender. Yet, the court below did not require the government to show how many non-marital children at risk of statelessness with one U.S. citizen parent are children of U.S. citizen mothers, or the extent to which being born abroad out of wedlock to a U.S. citizen mother correlates with statelessness generally. Nor did the government offer such proof. Indeed, the government has not pointed to any study or compilation of data that supports its assertion that "the risk that a child born abroad to unmarried parents will be rendered stateless is much higher when his mother is a United States citizen," Cert. Opp. at 15. Pet'r Br. at 27-34; Br. of Amici Curiae Scholars on Statelessness.

Second, lacking record evidence, the Ninth Circuit assumed that Congress adopted the disparate residency requirements in § 1409 as a considered

response to the problem of statelessness, and that this conclusion was sufficiently persuasive in light of Congress's authority in the area of immigration and citizenship. *Flores-Villar*, 536 F.3d at 996. The legislative history is far less clear. The provisions governing the transmission of citizenship to children born out of wedlock were first adopted in 1940. The legislative hearings that led to passage of the 1940 Act are silent on the risk of statelessness facing the non-marital children of either U.S. citizen mothers or fathers. Pet'r Br. at 36. This silence simply does not support the conclusion that Congress recognized a unique problem faced by the non-marital children of U.S. citizen mothers, but not fathers, and drafted the statutory language in response.

In fact, the problem of statelessness is not unique to the non-marital children of U.S. citizen mothers. Many non-marital children of U.S. citizen fathers are at risk of statelessness because they are born in countries that recognize the paternal transmission of statutory birthright citizenship. Pet'r Br. at 30-31 n.10; Br. of Amici Curiae Scholars on Statelessness. Many other children become stateless because they are born in countries where acknowledgement or legitimation by the father deprives the child of acquiring the citizenship of his mother, as the government has recognized on other occasions. *See* U.S. Br., *Nguyen v. INS*, 2000 WL 1868100 *17, *18 n.9 (5th Cir. 2000) (No. 99-2071); Pet'r Br. at 29-32.

If Congress was concerned about the problem of children's statelessness, the 1940 Act was a strange response because it exacerbated the risk of

statelessness for non-marital children born abroad to U.S. citizen fathers. For U.S. citizen mothers, the rules matched prior State Department policy: the non-marital child of a U.S. citizen mother was entitled to U.S. citizenship if the mother had resided in the U.S. for any period of time prior to the child's birth. Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669, 1689-93 (2000).[6] As a result of the 1940 Act, however, a U.S. citizen father under the same circumstances was required to show that he had resided in the U.S. for a total of ten years, five of which were after the age of 16 years old.[7]

The government seeks to explain the disparate residency requirements adopted in 1940 by pointing to a passage from the Senate Report accompanying the 1952 Act, but its reliance is misplaced. U.S. Br., *U.S. v. Flores Villar*, 2008 WL 1848810 *14 (9th Cir. 2008) (No. 07-50445). The 1952 Act made various changes to the provisions governing birthright citizenship, and the Senate Report explained one of

---

[6] Furthermore, non-marital children of U.S. citizen mothers and fathers faced differential residency requirements to *retain* their citizenship. While children of U.S. citizen mothers absolutely acquired citizenship at birth, children of U.S. citizen fathers were required to reside in the U.S. for a period of five years between the ages of 13 and 21 years old or lose their citizenship. Nationality Act of 1940, ch. 876, §§ 201(g), 205, 54 Stat. 1138-1139 (repealed 1952).

[7] The age after which the five years of residency must occur was changed from 16 years old to 14 years old by the Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 301(a)(7), 66 Stat. 235-236 (1952).

those changes by stating: "This provision establishing the child's nationality as that of the mother regardless of the legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth." S. Rep. 1137, 82d Cong., 2d Sess. 39 (1952). This statement, however, did not address the disparate residency requirements at issue here. Rather, it referred to the deletion of a provision that allowed mothers to transmit citizenship only when legitimation by the father had not occurred. The Report recognizes that this non-legitimation condition had created uncertainty for children because legitimation remained a possibility until the child reached the age of majority. By eliminating that contingency, Congress ensured that children could acquire a nationality through their mothers at birth, rather than being forced to wait to discover whether or not they were U.S. citizens. Because the Report language was not even trying to justify the disparate residency requirements, it certainly does not meet the government's burden of justification under heightened scrutiny.

Third, as demonstrated by Petitioner and other *amici*, the most plausible explanation for the disparate residency requirements is that Congress was legislating based on stereotypical assumptions regarding maternal responsibility and paternal irresponsibility for children born out of wedlock. Pet'r Br. at 10-13, 35-41; Br. of Amici Curiae Professors of Law, History, and Political Science. This Court's modern equal protection jurisprudence has consistently rejected such gender-based

generalizations as a basis for legislative classifications.

The facts of this case highlight the unfairness of such generalizations. The Petitioner's father is just one of millions of American fathers who are primary caretakers of their children. In 2007, there were 5.2 million households with children headed by males with no spouse present, representing a two million household increase from 1995. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007 3 (2009), http://www.census.gov/prod/2009pubs/p20-561.pdf; U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1995 2 (1996), http://www.census.gov/prod/2/pop/p20/p20-488.pdf. A 1996 federal study found that approximately 18% of children five years old or younger had fathers as primary caregivers, and fathers with less than a high school education were primary caregivers to 27% of preschool age children. U.S. DEP'T OF HEALTH AND HUMAN SERV., CHARTING PARENTHOOD: A STATISTICAL PORTRAIT OF FATHERS AND MOTHERS IN AMERICA 25 (2002), http://fatherhood.hhs.gov/charting02/ChartingParenthood02.pdf. In 2008, about 1.8 million paternities were established and acknowledged in the United States. OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2008 PRELIMINARY REPORT (2009), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/preliminary_report_fy2008/.

Fourth, even assuming that the disparate residency requirements were adopted as a benign

benefit for U.S. citizen mothers whose non-marital children were born abroad, section 1409 is an unconstitutional means of accomplishing that goal because it unfairly and unnecessarily disadvantages the similarly situated children of U.S. citizen fathers. This Court's precedents establish that "[s]ex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, or to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533 (citations omitted). But they cannot be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes." *Wiesenfeld*, 420 U.S. at 648.[8]

---

[8] Furthermore, the disparate residency requirements that apply to fathers and mothers of non-marital children under § 1409 cannot be justified on the ground that fathers of non-marital children are subject to the same residency requirements as parents of marital children. The equivalency is incomplete and misleading. For married parents, the citizen mother or father simply needs to establish that she or he meets the residency requirement in order to transmit citizenship. 8 U.S.C. § 1401(a)(7) (1970). But citizen fathers of non-marital children must meet multiple statutory hurdles – the legitimation requirement approved in *Nguyen* as well as the residency requirement at issue here – that act together to prevent some fathers from transmitting citizenship regardless of their best efforts, render non-marital children stateless due to legitimation by their fathers, or discourage the legitimation of these children.

Fifth, the Ninth Circuit failed to address the existence of gender-neutral alternatives, an important factor in evaluating the validity of a gender-based classification. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 281 (1979); *Craig*, 429 U.S. at 199. If statelessness is the true concern, the government could simply adopt the length of residency required of mothers for fathers, or it could make individualized determinations about the risk of statelessness depending on the circumstances of the child's birth. Unconstitutional discrimination cannot be justified on the basis of administrative convenience.[9] As this Court has noted: "[A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated.'" *Frontiero*, 411 U.S. at 690. *See also Wengler*, 446 U.S. at 152; *Craig*, 429 U.S. at 197-98.

Sixth, in relying on *Nguyen*, the Ninth Circuit failed to recognize a critical distinction between this case and that one, although both address aspects of § 1409. In *Nguyen*, this Court emphasized that the procedural legitimation requirements at issue were not "inordinate and unnecessary hurdles" and "can be satisfied on the day of birth, or the next day, or

---

[9] In any case, there has been no showing that processing requests from all non-marital children of U.S. citizen mothers who have resided in the U.S. for one year, including those children with a nationality, is less burdensome than the gender-neutral alternatives.

the next 18 years." 533 U.S. at 70-71. That is not true here. In denying the Petitioner's claim to citizenship, the government openly acknowledged that the law made it "'physically impossible for [his father] to have the required physical presence necessary,'" because he became a parent when he was less than 19 years old. Pet'r Br. at 3 (citation omitted).

The distinction between procedural barriers and absolute bars has constitutional significance, as this Court has recognized in other gender discrimination cases. *See Califano v. Westcott*, 443 U.S. 76, 85 (1979). *See also Virginia*, 518 U.S. at 546 (state's goal of producing citizen-soldiers "is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit").

Indeed, even prior to the adoption of heightened scrutiny as the standard of review for gender classifications, this Court recognized that a simple preference for one sex as a proxy for deciding the merits of an issue is frequently arbitrary, *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), and that distinctions drawn between similarly situated men and women are generally "gratuitous" and "entirely irrational," *Wiesenfeld*, 420 U.S. at 650, 653. Because the residency requirements gratuitously differentiate based on gender, they also would not survive a more deferential standard of review.

A fortiori, the government has failed to demonstrate the exceedingly persuasive justification that the Constitution requires under these circumstances. The gender-based residency require-

ments of § 1409 are not substantially related to any interest in reducing statelessness, completely shut out some members of one sex from transmitting citizenship, and were not designed to redress disparate treatment of women. They impermissibly distinguish between similarly situated parents and thus violate the right to equal protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Sandra S. Park
Counsel of Record
Steven R. Shapiro
Lenora M. Lapidus
Lee Gelernt
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
spark@aclu.org

Lucas Guttentag
Jennifer Chang Newell
American Civil Liberties
Union Foundation
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770

David Blair-Loy
Sean Riordan
ACLU of San Diego and
Imperial Counties
PO Box 87131
San Diego, CA 92138
(619) 232-2121

Dated June 24, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 25 2010
OFFICE OF THE CLERK

No. 09-5801

IN THE

Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* EQUALITY NOW, HUMAN RIGHTS WATCH AND OTHER HUMAN RIGHTS ORGANIZATIONS AND INSTITUTIONS IN SUPPORT OF PETITIONER

(List of additional *Amici* continued on inside cover)

MARTHA F. DAVIS*
Counsel of Record
JAMES V. ROWAN
Program on Human Rights
and the Global Economy
Northeastern University
School of Law
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 373-8924
m.davis@neu.edu

Attorneys for Amici Curiae

* Admitted in New York
and Illinois

075 40

LIST OF ADDITIONAL *AMICI*

BAHRAIN WOMEN ASSOCIATION FOR HUMAN DEVELOPMENT

ETHIOPIAN WOMEN LAWYERS ASSOCIATION

FORUM FOR WOMEN, LAW AND DEVELOPMENT

THE INTERNATIONAL HUMAN RIGHTS LAW CLINIC AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW

INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH

INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH ASIA PACIFIC

THE LATIN AMERICAN AND CARIBBEAN COMMITTEE FOR THE DEFENSE OF WOMEN'S RIGHTS

WOMEN IN LAW AND DEVELOPMENT IN AFRICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE JUDGMENTS OF OTHER NATIONS AND THE WORLD COMMUNITY ARE RELEVANT TO THIS COURT'S REVIEW OF 8 U.S.C. §§ 1401(A)(7) AND 1409 (1974) 2

II. THE OVERWHELMING WEIGHT OF WORLD OPINION REJECTS SEX-BASED CITIZENSHIP LAWS 6

A. National Supreme Courts Have Repeatedly Recognized the Presumptive Importance of Sex Equality in Citizenship Laws, and Have Criticized Sex-Based Citizenship Classifications as Irrational and Unreasonable 6

1. All Non-U.S. Supreme Courts Ruling in Recent Decades, Save One, Have Recognized the Presumptive Importance of Sex Equality in Citizenship Laws 7

2. National Supreme Courts Considering the Issue Have Determined that the Judiciary has an Important Role to Play in Ensuring Sex Equality in Citizenship Laws 14

B. International Treaties and Decisions of International Bodies Consistently Require Sex Equality in Citizenship Law 16

III. A DECISION TO STRIKE DOWN THE SEX-BASED CLASSIFICATIONS AT ISSUE HERE WOULD BE AMPLY SUPPORTED BY "RESPECTED REASONING" FROM THE WORLD COMMUNITY 22

CONCLUSION 24

APPENDIX I 1

TABLE OF AUTHORITIES

UNITED STATES CASES AND OTHER AUTHORITIES

Graham v. Florida,
130 S. Ct. 2011 (2010) 3

Grutter v. Bollinger,
539 U.S. 306 (2003) 4

Lawrence v. Texas,
539 U.S. 558 (2003) 4

Mackenzie v. Hare,
239 U.S. 299 (1915) 14

Miller v. Albright,
523 U.S. 420 (1998) 5, 14

Nguyen v. INS,
533 U.S. 53 (2001) 14

Printz v. United States,
521 U.S. 898 (1997) 5

Washington v. Glucksberg,
521 U.S. 702 (1997) 4

U.S. Const., amend. XIV, § 1 4

The Declaration of Independence (U.S. 1776) 2

FOREIGN CASES

Abdulaziz, Cabales & Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (Ser. A) (1995) 20

Attorney General v. Unity Dow, (1992) 103 I.L.R. 128, *reprinted in The Citizenship Case: The Attorney General of The Republic of Botswana vs Unity Dow Court Documents, Judgements', Cases and Materials*, 123-97 (Unity Dow ed., 1995) 11, 12, 15

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 (Can.) 8, 9

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 21, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 217 (Ger.) 10

Case of the Yean and Bosico Children v. The Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).....21

Corte Costituzionale, 28 Gennaio 1983, Giur. it. 1983, I, 91 (It.) 11

In re Gender Equality, (2008) 40 PLD (FSC) 1 (Pak.).....23

Malkani v. The Secretary, Minister of Home Affairs, Writ Petition no. 3192 of 1992, Bangl. Sup. Ct., High Ct. Div. (1997).....13

Meera Gurung v. Her Majesty's Gov't, Dep't of Central Immigration, Ministry of Home Affairs, Dec'n No. 4858 2051 (S. Ct. 1994) (Nepal) 12, 15, 16

Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No.4 (Jan. 19, 1984).....21

Rattigan and Others v. Chief Immigration Officer, 1995(2) SA 182 (ZS) (Zim.) 12

Saikō Saibansho [Sup. Ct.] June 6, 2008, Hei 6 (Gyo-Tsu) no. 135, 62 Saiko Saibansho Minji Hanreishū [Minshū] (Japan) 9, 15, 16

Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) (1981).....20

Verfassungsgerichtshof [VfGH] [Constitutional Court] 1984, Erkenntnisse und Beschlusse Verfassungsgeruchtshofes [VfSlg] No. 10.036/1984 (Austria).....10

FOREIGN LAWS

The Citizenship (Amendment) Act
(Act no. 17/2009) (Bangl.) 13

Egyptian Constitution. Law No. 154 of 2004
(To Amend Provisions of Law No. 26
of 1975 Concerning Egyptian Nationality)
Al-Jarida Al-Rasmiyya, 26 July 2004 13

TREATIES AND CONVENTIONS

African Charter on Human and Peoples'
Rights, June 27, 1981, 1520 U.N.T.S. 217 .... 18, 19

African Charter on the Rights and
Welfare of the Child,
OAU Doc. CAB/LEG/24.9/49 (1990) 19

American Convention on Human Rights,
Nov. 22, 1969, 1144 U.N.T.S. 143 18

Convention on the Elimination of All
Forms of Discrimination against Women,
Dec. 18, 1979, 1249 U.N.T.S. 13 ..... 4, 17

Convention on the Rights of the Child,
Nov. 20, 1989, 1577 U.N.T.S. 3 ..... 17, 19

European Convention on Human Rights,
Nov. 4, 1950, 213 U.N.T.S. 221 18

European Convention on Nationality,
Nov. 6, 1997, 2135 U.N.T.S. 213 19

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ..... 16, 19

BOOKS AND LAW REVIEW ARTICLES

Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) 2

Claus Hofhansel, *Citizenship in Austria, Germany, and Switzerland: Courts, Legislatures, and Administrators*, 42 Int'l Migration Rev. 1 (2008) 10

Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 Loy. L.A. L. Rev. 271 (2003) 5

Karen Knop, *Gender and Nationality in Int'l Law*, in Citizenship Today: Global Perspectives and Practices (2001) 11

Sandra Day O'Connor, Commentary, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Law. 20 (Sept. 1998) 3

Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (2000) 10

MISCELLANEOUS

Brad K. Blitz, Refugee Studies Centre, *Statelessness, Protection and Equality* (2009) 21

Cairo Court Rules on Egyptians Married to Israeli Women, BBC News, June 5, 2010.....13

Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Sep. 15, 1995).....18

International Law Association, *Feminism and International Law*, Res. 5/2000 (July 25, 2000)..19

International Law Association Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law* (2000).....5, 11, 19

Dalila Mahdawi and Carol Rizk, *Landmark Ruling Granting Citizenship to Children of Lebanese Mother Overturned*, Lebanon Daily Star, May 19, 2010.....13

Office of the High Commissioner for Human Rights, Status of Ratification of Human Rights Instruments 17, 18

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).....16

INTEREST OF AMICI CURIAE

Amici Curiae file this brief in support of Petitioner. The statements of interest of Amici Curiae are set forth in Appendix I.[1]

SUMMARY OF ARGUMENT

This Court has often examined the opinions of the world community when considering constitutional cases that address common concerns among nations. The case at bar is just such a case, presenting a question of domestic citizenship criteria that both affects other nations and relates to fundamental issues of sex equality that cut across jurisdictional boundaries.

The world community's position on sex-based classifications in citizenship laws is clear. Amici have identified nine supreme courts from other nations that have addressed these issues in the past four decades; all but one has rejected sex-based classifications, with several characterizing the citizenship distinctions between men and women in this context as "irrational" and "unreasonable."

International law is also unequivocal on this point. International and regional treaties and

---

[1] Pursuant to Supreme Court Rule 37, counsel of record for both parties have received timely notice of amici's intention to file an *amici curiae* brief in support of the petition for *certiorari*, and letters of consent to the filing of this brief have been submitted to the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amici themselves, made a monetary contribution to the preparation or submission of this brief.

decision-making bodies register concern about statelessness, but uniformly demand that any national policies to avoid statelessness be reconciled with accepted norms of equal citizenship, without sex-based classifications that undermine equality.

A decision to strike the statute at issue here under the Equal Protection Clause would find ample support from the opinions of the world community. In contrast, a decision upholding sex-based classifications would not only dilute domestic equal protection jurisprudence but would also run the risk of undermining equality norms worldwide, as other national supreme courts look to this Court for guidance on this common issue.

ARGUMENT

I. THE JUDGMENTS OF OTHER NATIONS AND THE WORLD COMMUNITY ARE RELEVANT TO THIS COURT'S REVIEW OF 8 U.S.C. §§ 1401(A)(7) AND 1409 (1974)

Since the founding generation, this Court has examined the position of the world community and paid "decent respect to the opinions of mankind," when relevant, in its opinions. *The Declaration of Independence* para. 1 (U.S. 1776); Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 5-6, 14, 99 (2006) (citing *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg and Breyer, JJ., concurring); *Perkins v. Elg*, 307 U.S. 325, 329 (1939); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157 (1820); *Ware v. Hylton*, 3 U.S. (3 Dall.) 196, 261 (1796)).

A majority of the Court continues to find utility in this longstanding practice. The recent decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), addressing the constitutionality of life without parole sentences for juveniles who did not commit homicide, includes eloquent reference to the judgments of other nations and a clear explanation of their relevance. 130 S. Ct. at 2033-34. Noting that the sentencing practice at issue has been "rejected the world over," the Court makes clear that "[t]his observation does not control our decision." *Id.* at 2033. Rather, the global consensus provides support for the Court's "independent conclusion that a particular punishment is cruel and unusual." *Id.* According to the Court, "the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Id.* at 2034.

While this Court's rationale for canvassing the laws and practices of the world community has been most recently reiterated in a case involving the Eighth Amendment, it is not only those cases where international and foreign law has been found relevant. Indeed, Justice O'Connor has asserted that U.S. judges have reason to look to international decisions in a range of circumstances where constitutional democracies are struggling with common concerns. Sandra Day O'Connor, Commentary, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Law. 20, 21 (Sept. 1998).

This Court has not hesitated to make note of relevant foreign and international law in such cases.

For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court reasoned that because the holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), relied on the "values we share with a wider civilization," decisions from other countries and international entities that protected the liberty of individuals to engage in private intimate conduct were relevant to its decision. 539 U.S. at 576-77. Further, the Court found international opinion to be relevant because there was no showing that the government interest in proscribing a right that was accepted as an "integral part of human freedom in many other countries" was "more legitimate or urgent" in the U.S. than internationally. *Id.* at 577. Similarly, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), arising under the Due Process Clause of the 14th Amendment, a majority of this Court catalogued the practices "in almost every western democracy" that criminalize assisted suicide. 521 U.S. at 710. Thus, in determining the scope of liberty and due process under the Fourteenth Amendment, this Court looked to foreign and international law to bolster its reasoning.

Individual justices have also opined on the value of comparative glances. Writing in concurrence, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Ginsburg underscored the consonance between the majority's observation that "race-conscious programs 'must have a logical end point'" and relevant international law, including the Convention on the Elimination of All Forms of Discrimination Against Women. 539 U.S. at 344 (Ginsburg, J., concurring). Further, looking beyond the sphere of individual rights to issues of

Constitutional structure, Justice Breyer noted in *Printz v. United States*, 521 U.S. 898 (1997), that the experiences of other nations may "cast an empirical light on the consequences of different solutions to a common legal problem." 521 U.S. at 977 (Breyer, J., dissenting).

The case at bar presents a similar issue of "common concern." Conflicts between sex equality norms and citizenship laws have confronted national courts around the globe and have been specifically addressed by many international and regional bodies.[2] *See, e.g.*, International Law Association Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law* (2000), http://www.unhcr.org/3dc7cccf4.pdf [hereinafter ILA Report] (analyzing comparative case law and international law on sex equality and citizenship as of 2000). As Professor Vicki C. Jackson recently observed, cases involving this tension are particularly appropriate for comparative analysis, not only because of the potential impact of this Court's decision on other nations, but also because of the ways in which comparative analysis can illuminate and clarify this Court's reasoning about sex equality – an issue that transcends national boundaries while still requiring analysis tailored to domestic contexts. Vicki C. Jackson, *Transnational*

---

[2] In *Miller v. Albright*, 523 U.S. 420 (1998), Justice Ginsburg noted the formal distinction between "citizenship" and "nationality," while concluding that "the distinction has little practical impact today." 523 U.S. at 467 n.2 (Ginsburg, J., dissenting). In this brief, amici use "citizenship" and "nationality" interchangeably unless otherwise noted.

Discourse, Relational Authority, and the U.S. Court: Gender Equality, 37 Loy. L.A. L. Rev. 271, 351-58 (2003).

II. THE OVERWHELMING WEIGHT OF WORLD OPINION REJECTS SEX-BASED CITIZENSHIP LAWS

A. National Supreme Courts Have Repeatedly Recognized the Presumptive Importance of Sex Equality in Citizenship Laws, and Have Criticized Sex-Based Citizenship Classifications as Irrational and Unreasonable

The case at bar presents a specific question regarding the treatment of a foreign-born, out-of-wedlock child of a citizen father under U.S. citizenship law, and raises the more general question of when, if ever, sex-based classifications are a defensible component of the nation's citizenship laws. Rather than provide a listing of global laws and practices, this brief canvasses the conclusions and reasoning of jurists who have addressed this question in their own domestic contexts. In total, amici have identified nine supreme courts – the highest courts of their respective nations – that have issued rulings of this type in the past four decades.[3]

---

[3] The supreme court (or equivalent) cases identified by amici are from Austria, Botswana, Canada, Egypt, Germany, Italy, Japan, Nepal and Zimbabwe. The decision from Austria strikes down a citizenship law making distinctions based on

All but one of these courts rejected the use of sex-based classifications to limit citizenship rights. Many of the courts rejecting sex-based classifications used the strongest possible terms to criticize the distinctions. As described below, the reasoning of these jurists sounds a number of themes that resonate with the case at bar.

1. All Non-U.S. Supreme Courts Ruling in Recent Decades, Save One, Have Recognized the Presumptive Importance of Sex Equality in Citizenship Laws

All of the national supreme courts identified by amici that have addressed sex-based citizenship laws have, with the exception of Egypt, found that the important legal norm of equality overrides competing concerns offered to justify sex-based classifications. Thus, when the Supreme Court of Canada struck down a law providing that children born abroad to a Canadian mother would be subjected to a security check and an oath when seeking citizenship, while those born abroad to a Canadian father would not, it reviewed the classification under its constitutional guarantee of

---

both sex and birth status, but the court's opinion focuses primarily on birth status. Amici also make note of lower court opinions from Pakistan, Bangladesh and Lebanon. With this brief, amici submit a letter to the Court offering to lodge copies of the relevant decisions that are not available from online sources. Because the opinions of Austria, Germany and Italy are not available in English translations, amici's discussions of those cases rely on reputable secondary sources.

equality protection and equal benefit of the law "without discrimination based on . . . sex." *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, paras. 10, 90-1 (Can.). There was no question that the government's legislative goals were important; the parties and the court readily accepted that "establishing a commitment to Canada and safeguarding the security of its citizens" were "pressing" and "substantial" governmental objectives. *Id.* at para. 94. Yet the justices concluded that the law was irrational. *Id.* at paras. 95-101.

According to the court, "the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nation-building or national security underlying the Citizenship Act."[4] *Id.* at para. 67. Further, the court held, "[t]here is clearly no inherent connection between this distinction and the desired legislative objectives: children of Canadian mothers are not in and of themselves less committed or more dangerous than those of Canadian fathers." *Id.* at para. 95. The court was particularly concerned about the immutable nature of the classification, noting that the strict application of equality principles is critically important when access to citizenship is restricted based on factors "so completely beyond the control of an applicant as the gender of his or her Canadian parent." *Id.* at para. 85.

---

[4] The Canadian Supreme Court summarily rejected the claim that the remeliorative nature of the challenged legislation, which provided more generous citizenship provisions to women than earlier laws, would insulate the sex-based classifications from review. *Benner*, [1997] 1 S.C.R. at para. 75.

Likewise, in 2008, the Supreme Court of Japan struck down a sex-based classification affecting the ability of out-of-wedlock children to acquire Japanese citizenship. The court examined the statute in light of the Japanese constitution's equality guarantee. Saikō Saibansho [Sup. Ct.] June 6, 2008, Hei 6 (Gyo Tsu) no. 135, 62 Saikō Saibansho Minji Hanreishū [Minshū] Majority § 2 (Japan), *translated at* http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html (discussing Japanese Constitution, art. 14, para. 1). The Japanese high court credited the importance of ensuring close ties between the out-of-wedlock child and Japan, noting that the sex-based provisions might have served this purpose in the past. *Id.* at § 4(4)(2)(a), (b). However, the court concluded that this antiquated rationale was insufficient to uphold discriminatory provisions in contemporary times. As the majority stated, many other nations are "moving toward scrapping discriminatory treatment by law against children born out of wedlock," and "the realities of family life and parent-child relationships have changed and become diverse." *Id.* at § 4(4)(2)(c). Justice Izumi's concurrence, addressing sex equality as well as birth status discrimination, added that in light of these societal changes, this law seemed to be based on a "stereotyped and rigid way of thinking." *Id.* at Izumi Concurrence § 3. The majority concluded that the distinction in the statute did not demonstrate the "reasonable relevance" necessary to pass constitutional muster. *Id.* at Majority § 4(3).

Ruling decades before the Japanese court, in 1974, the Federal Constitutional Court of Germany struck sex-based nationality laws that precluded German mothers, but not fathers, from transmitting citizenship to their children. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 21, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 217 (Ger.), http://www.servat.unibe.ch/fallrecht/bv037217.html.[5] The German government argued that abolition of sex-based classifications would lead to more instances of dual citizenship, a status that was deemed legally problematic at the time. The court rejected this justification, however, concluding that it was not sufficiently compelling to warrant overriding constitutional equality principles. *Id.*; *see also*, Verfassungsgerichtshof [VfGH] [Constitutional Court] 1984, Erkenntnisse und Beschlusse Verfassungsgeruchtshofes [VfSlg] No. 10.036/1984 (Austria), http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_10159388_82G00054_00/JFT_10159388_82G00054_00.pdf (decision of Austrian Constitutional Court striking down sex- and illegitimacy-based citizenship law that conflicted with constitutional equality protections).[6]

---

[5] Described in Claus Hofhansel, *Citizenship in Austria, Germany, and Switzerland: Courts, Legislatures, and Administrators*, 42 Int'l Migration Rev. 163, 178-79 (2008); Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* 231 (2000).

[6] Described in Hofhansel, *supra* note 5, at 171

In 1983, the Italian Constitutional Court also invoked constitutional equality principles to strike down a 1912 law providing that the child of a male Italian citizen was an Italian citizen by birth but making no such provision for the child of a female Italian citizen. Corte Costituzionale, 28 Gennaio 1983, Giur. it. 1983, I, 91 (It.).[7] As in Germany, the court entertained government arguments that sex-based citizenship classifications were necessary to avoid dual nationality. The court concluded, however, that the desire to avoid dual nationality was not a valid reason to ignore the equality guarantees of the Italian constitution. Instead, according to the court, the constitutional principle of equality took precedence, despite the serious inconveniences caused by dual nationality. *Id.*

In *Attorney General v. Unity Dow*, (1992) 103 I.L.R. 128, 131 (Bots.), the Court of Appeal for Botswana, the highest court of that nation, judged as irrational a law that conditioned the citizenship of a child born in Botswana to married parents solely on the citizenship of the child's father, regardless of the mother's citizenship.[8] In reaching this conclusion, the court determined that the Botswana Constitution guaranteed equal protection on the basis of sex – citing as a model the jurisprudence of the U.S.

---

[7] Described in ILA Report, *supra*, at 33; Karen Knop, *Gender and Nationality in International Law*, *in* Citizenship Today: Global Perspectives and Practices 89, 106 (2001).

[8] Reprinted in *The Citizenship Case: The Attorney General of The Republic of Botswana vs Unity Dow Court Documents, Judgments, Cases and Materials*, 123-97 (Unity Dow ed., 1995), *available at* http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm.

construing our own equal protection clause. Dow, ed., *supra* note 8, at 132 (citing, *inter alia*, *Craig v. Boren*, 429 U.S. 190 (1976)).

Two other high courts have reached similar conclusions. In 1995, the Zimbabwe Supreme Court struck a sex-based classification impinging on individuals' citizenship rights under its constitutional equality principle, providing that "every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual," regardless of sex. *Rattigan and Others v. Chief Immigration Officer*, 1995(2) SA 182 (ZS) (Zim.), http://www.unhcr.org/refworld/docid/3ae6b6d62c.html. Further, in *Meera Gurung v. Her Majesty's Gov't, Dep't of Central Immigration, Ministry of Home Affairs*, Dec'n No. 4858 2051 (S. Ct. 1994) (Nepal), the Supreme Court of Nepal struck down a provision that dictated different treatment as between citizen men and citizen women when transmitting visa rights to their spouses. *Id.* at ¶ 14. According to the court, the statutory provisions "awarding more importance and weight to the relation with a Nepalese man than that to the relation with a Nepalese woman" constitute discrimination in violation of constitutional equality principles. *Id.*

Amici have identified only one foreign supreme court that has upheld sex-based classifications in recent decades. In June 2010, the Supreme Administrative Court of Egypt upheld a law that establishes a process for stripping the citizenship of Egyptian men who marry Israeli women in circumstances where the government determines that the marriage raises a threat of

foreign spying.[9] *Cairo Court Rules on Egyptians Married to Israeli Women*, BBC News, June 5, 2010, http://news.bbc.co.uk/2/hi/world/africa/10247437.stm. However, the persuasive value of this case is extremely limited. First, the decision is the judgment of a supreme administrative court, not a constitutional court. Second, the specific law upheld by the Egyptian court reflects longstanding tensions between two nations that have no analog in the proceeding here. Third, this law can be characterized as an aberration. Egyptian nationality law has generally bent toward equality, and was amended in 2004 to allow married Egyptian women the same right as married men to pass their nationality to their children in conformity with the Egyptian Constitution. Law No. 154 of 2004 (To Amend Provisions of Law No. 26 of 1975 Concerning

---

[9] The issue of sex-based classifications in nationality law has also recently been litigated in Lebanon, though no case has reached the nation's highest court. *See* Dalila Mahdawi and Carol Rizk, *Landmark Ruling Granting Citizenship to Children of Lebanese Mother Overturned*, Lebanon Daily Star, May 19, 2010, *available at* http://www.dailystar.com.lb/article.asp?edition_id=1&categ_id=1&article_id=115007#axzz0rDNIdd00 (noting that a recent appeals court decision on this issue will likely be appealed to the highest court). In 1994, the High Court division of the Supreme Court of Bangladesh upheld sex-based nationality classifications based on a specific analysis of the language of the Bangladesh Constitution. The case was not appealed to the Appellate Division of the Supreme Court, which is the nation's highest court. *Malkani v. The Secretary, Minister of Home Affairs*, Writ Petition no. 3192 of 1992, Bangl. Sup. Ct., High Ct. Div. (1997). The legislature subsequently amended the law at issue. The Citizenship (Amendment) Act (Act no. 17/2009) (Bangl.), http://www.unhcr.org/refworld/docid/4a8032182.html.

Egyptian Nationality) *Al-Jarida Al-Rasmiyya*, 26 July 2004 (Egypt).

Notably, this recent Egyptian approach to restrict citizenship of those who marry foreigners is not entirely alien to U.S. law; American women faced general restrictions on marriage to non-citizens almost a century ago, for similar reasons. *See, e.g.*, *Miller v. Albright*, 523 U.S. 420, 463-64 (1998) (Ginsburg, J., dissenting); *Mackenzie v. Hare*, 239 U.S. 299, 307 (1915). While those particular restrictions were repealed in 1922, the sex-based classifications that remain a part of U.S. citizenship law, and that are challenged here, are a legacy of that period. *Miller*, 523 U.S. at 463-68 (Ginsburg, J., dissenting); *Nguyen v. INS*, 533 U.S. 53, 89 (2001) (O'Connor, J., dissenting).

2. National Supreme Courts Considering the Issue Have Determined that the Judiciary has an Important Role to Play in Ensuring Sex Equality in Citizenship Laws

Recognizing the importance of citizenship criteria to sovereign identity, a number of national courts have grappled with the question of the judicial role in reviewing citizenship laws. The supreme courts that have squarely addressed this issue have concluded that the judiciary has an important role to play in enforcing equality norms, and that the court can serve that function without impinging on legislative authority over citizenship.

The issue of the court's role was directly addressed by the Japanese Supreme Court. There,

the court noted that criteria for acquiring nationality are generally left to the legislature, which is in a position to take into account a range of social and political issues. 62 Minshū at Majority § 4(1). However, wrote the court, any law that "amounts to discriminatory treatment without reasonable grounds" should be subject to constitutional scrutiny by the courts. *Id.* The court proceeded to strike down Japan's sex-based nationality law as an unreasonable exercise of legislative power. *Id.* at § 5(1).

The Court of Appeal of Botswana was similarly explicit in addressing the parameters of judicial review. In considering the constitutionality of the sex-based provision of the Botswana Citizenship Act, the court observed that "[w]here the legislature is confronted with passing a law on citizenship, its only course is to adopt a prescription which complies with the imperatives of the Constitution, especially those which confer fundamental rights to individuals in the State." Dow, ed., *supra* note 8, at 139. Finding that the sex-based approach taken by the legislature was irrational, the court held the citizenship law to be *ultra vires* the Constitution. *Id.* at 158.

Finally, the Supreme Court of Nepal noted that under the language of its constitution, "[t]he matter as to which or what foreigners are to be allowed to enter into the Kingdom of Nepal . . . is a matter of reason and discretion of His Majesty's Government." *Meera Gurung*, at ¶ 14. However, where the government policy violated a constitutional provision, the court opined, "there should be reasonable cause" to support the policy.

Id. The court concluded that the sex-based law at issue did not meet even the minimal test of reasonableness.

In sum, all of the supreme courts described here that reached the constitutional question presented by sex-based citizenship laws apparently accepted that they had an important role to play in enforcing constitutional equality norms. The three courts that directly addressed the issue provide additional illumination of that question that may be helpful to this Court.

B. International Treaties and Decisions of International Bodies Consistently Require Sex Equality in Citizenship Laws

Beyond the rulings of individual supreme courts, the world community has spoken clearly through international treaties and decisions of international bodies to reject sex-based citizenship classifications. Indeed, many of the courts cited above specifically noted the relevance to their decisions of international law. *See, e.g.*, Minshū Vol. 62, No. 6, 2006 (Gyo-Tsu) No. 135.

International law universally recognizes sex equality as a fundamental human right. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . sex"); International Covenant on Civil and Political Rights art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter

ICCPR] ("[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"); Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's . . . sex"); Convention on the Elimination of All Forms of Discrimination against Women art. 2(a), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (stating that the purpose of the convention is "[t]o embody the principle of the equality of men and women in their national constitutions... and to ensure, through law and other appropriate means, the practical realization of this principle").

CEDAW Article 9(2) specifically addresses sex equality in the citizenship context, stating that "States Parties shall grant women equal rights with men with respect to the nationality of their children." Although the U.S. has signed but not ratified CRC and CEDAW, both conventions have been widely ratified by member countries of the United Nations. The U.S. is one of only two countries that have not ratified CRC,[10] and one of only seven countries that

---

[10] The U.S. and Somalia are the only two countries not party to the CRC. *See* OHCHR, Status of Ratification of Human Rights Instruments, http://www2.ohchr.org/english/law/docs/HRChart.xls (last updated May 12, 2010).

have not ratified CEDAW.[11]

This principle of sex equality, and in particular sex equality in citizenship law, has been reinforced by international and regional declarations, conventions and conferences. For instance, the United Nations Fourth World Conference on Women in 1995 adopted the Beijing Platform, highlighting the commitment of member countries to the principle of sex equality. *See* Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Sep. 15, 1995). In addition, numerous regional inter-governmental bodies have announced strong commitments to sex equality. European Convention on Human Rights art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 ("The enjoyment of the rights and freedoms...shall be secured without discrimination on any ground such as sex..."); American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter ACHR] ("The States Parties to this Convention undertake to . . . ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of . . . sex . . .."); The African Charter on Human and Peoples' Rights arts. 18.1, 19, June 27, 1981, 1520 U.N.T.S. 217 ("The State shall ensure the elimination of every discrimination against women"; "All people shall be equal; they shall enjoy the same respect and shall have the same rights.").

---

[11] The only countries that have not ratified CEDAW are the U.S., Iran, Nauru, Palau, Somalia, Sudan and Tonga. *See* OHCHR, *supra* note 10. This chart also lists two other entities, the Holy See and Niue, that have not ratified CEDAW.

To combat the problem of statelessness, international conventions and treaties frequently include a right to nationality. *See, e.g.*, ICCPR art. 24(3) (promising every child a right to acquire nationality); CRC art. 7(1) (guaranteeing right to acquire nationality). In addition, numerous regional treaties include similar provisions. *See, e.g.*, European Convention on Nationality art. 4(a), Nov. 6, 1997, 2135 U.N.T.S. 213 [hereinafter "ECN"] ("[E]veryone has the right to a nationality."); ACHR art. 20(1) ("Every person has the right to a nationality."); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) ("Every child has the right to acquire a nationality."). This right to nationality complements the right to equal protection universally found in these treaties. *See, e.g.*, ECN art. 5 ("The rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour, national or ethnic origin."). Indeed, in a widely-circulated report, the International Law Association Committee on Feminism and International Law argued that where a treaty contains both provisions, they must be read together to "prohibit sexual discrimination in the laws awarding nationality." ILA Report, *supra*, at 37. Following completion of this report, the International Law Association issued a resolution calling for the elimination of sex-based preferential treatment in nationality rules, and recommending that in cases where parents are of different nationalities "each parent should have the right to transmit her or his nationality to the child." International Law

Association, *Feminism and International Law*, Res. 5/2000 §§ 3, 7 (July 25, 2000).

When faced with laws that create tension between the rights to citizenship and equal protection, international courts and tribunals have held that sex equality is an inviolable principle that must apply to citizenship law. This international case law establishes that the goal of avoiding statelessness does not trump the goal of sex equality, especially when the statelessness can be minimized without giving preference to one sex over another. For instance, in 1985, the European Court of Human Rights ruled that disparate treatment of men and women in the United Kingdom with respect to the ability of non-citizen spouses to enter and remain in the country violated the equal protection clause of the European Convention on Human Rights. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (Ser. A) at ¶ 83 (1985). The court recognized that "the advancement of the equality of the sexes is today a major goal," and that, accordingly, there must be "very weighty reasons" to justify "a difference of treatment on the ground of sex." *Id.* at ¶ 78. The court found that the United Kingdom's argument that the law should pass scrutiny because it gave "more favourable" treatment to a traditionally disfavored group did not qualify as such a reason. *See id.* at ¶ 82. *See also Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), http://www.unhcr.org/refworld/docid/3f520c562.html (finding that a sex-based citizenship classification automatically conferring legal rights and protections

to foreign wives of Mauritian citizens, but not to foreign husbands, violated the ICCPR's equality provisions). The Inter-American Court of Human Rights [hereinafter IACHR] came to the same conclusion when it responded to Costa Rica's request for an advisory opinion on its citizenship laws. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No.4 (Jan. 19, 1984). The proposed Costa Rican law allowed women who married Costa Rican nationals to apply for citizenship, but did not extend the same opportunity to men. *Id.* at ¶ 64-68. Relying on provisions of the ACHR that guaranteed equal protection under the law, equality in marriage, and access to nationality, the court directed Costa Rica to remove the specific reference to women so that the law would apply to all foreigners who married Costa Rican nationals. *Id.* at ¶ 67. *See also Case of the Yean and Bosico Children v. The Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, at 141 (Sept. 8, 2005) (holding that state authority to determine rights to nationality must be reconciled with principles of equality); Brad K. Blitz, Refugee Studies Centre, *Statelessness, Protection and Equality* 22 (2009), http://www.rsc.ox.ac.uk/PDFs/RSCPB3-Statelessness.pdf (discussing approaches to reconciling statelessness concerns and equality norms).

The international community has committed unequivocally to both sex equality and the elimination of statelessness, and has determined

that the former must not be sacrificed for the latter. Nor can restrictive citizenship laws, such as the law in question here, be justified on the grounds that they preference women. This Court, therefore, should follow and adhere to the growing international consensus for equal protection under nationality law.

III. A DECISION TO STRIKE DOWN THE SEX-BASED CLASSIFICATIONS AT ISSUE HERE WOULD BE AMPLY SUPPORTED BY "RESPECTED REASONING" FROM THE WORLD COMMUNITY

The international and comparative evidence presented here provides important support for principles that are dictated in the first instance by domestic law. The overwhelming weight of the cases and international law authority cited above support the domestic law arguments presented by the petitioner and other amici that the statutory provisions challenged here are both irrational and fail to pass muster under intermediate scrutiny.

Just as other nations have concluded when considering their own laws, the sex-based classifications at issue here are simply not sufficiently tailored to the governmental goal of preventing statelessness. Indeed, though operating in a very different legal regime than this Court or the other courts cited herein, even the Shariat court in Pakistan has recognized the weight of equality norms in the context of citizenship laws. The 1951

Pakistan Citizenship Act established that citizenship would be conferred upon a foreign woman married to a Pakistani man, but not a foreign man married to a Pakistani woman. Security concerns, along with a roster of social and political issues such as concerns about increased unemployment, were offered to justify the law. *In re Gender Equality*, (2008) 40 PLD (FSC) 1, 4-5 (Pak.). However, the Shariat Court summarily rejected these arguments, concluding that the classification violated the equality provisions of the Pakistan constitution and was also "repugnant" to the fundamental principles of Islam. *Id.* at 21 (the Quran and Sunnah in "unequivocal terms treat man and woman alike and repeatedly mention gender equality").

Importantly, as recognized by the European Nationality Convention and other international sources, a statute that would reconcile statelessness concerns with principles of equality could be crafted by holding both mothers and fathers to the less onerous residency standards currently applied only to mothers. Although both discrimination and statelessness can be easily avoided, the U.S. continues to opt for an approach that does neither, confirming the irrationality of the current legislative approach.

In continuing to defend such discriminatory citizenship laws, the U.S. undermines the domestic principles of sex equality and dilutes the meaning of constitutional equality worldwide. Respected reasoning from a wide range of international and comparative sources support a reversal of this approach.

CONCLUSION

For the reasons stated, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

MARTHA F. DAVIS*
Counsel of Record
JAMES V. ROWAN
Program on Human Rights and the Global Economy
Northeastern University School of Law
400 Huntington Avenue
Boston, MA 02115
m.davis@neu.edu
(617) 373-8921
Counsel for Amici Curiae

* Admitted in New York and Illinois

APPENDIX I

APPENDIX I

STATEMENTS OF INTEREST OF AMICI CURIAE

Equality Now is an international human rights organization working for the protection and promotion of the rights of women and girls worldwide with a membership network of more than 35,000 individuals and organizations in 160 countries. In July 1999, Equality Now issued a report, *Words and Deeds - Holding Governments Accountable in the Beijing + 5 Review Process*, highlighting a representative sampling of laws in 45 countries around the world that explicitly discriminate on the basis of sex. One of the discriminatory laws highlighted in this report, updated in February 2010, is Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), *as amended*, 8 U.S.C. § 1409, which grants citizenship to children born overseas and out of wedlock to only one U.S. citizen parent based on the sex of that parent and whether their unequal obligations as a father or mother under the statute have been met. Equality Now has continued its efforts to get 8 U.S.C. 1409 amended in accordance with the commitment made by the U.S. government, together with other governments, in ¶ 232(d) of the Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 4-15 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, to revoke laws that discriminate on the basis of sex. Equality Now submitted a brief with other organizations as *amici*

curiae in support of petitioners in *Nguyen v. INS*, 533 U.S. 53 (2001), which challenged the constitutionality of 8 U.S.C. § 1409 with reference to the equality rights set forth in the United Nations International Covenant on Civil and Political Rights and in emerging customary international law. The brief also argued that the U.S. Supreme Court has greatly influenced the jurisprudence of other countries and should therefore play a leading role in the establishment and promotion of international human rights law.

Bahrain Women Association For Human Development (BWA) is a non-profit organization established in July 2001 and was recognized in 2007 as the only non-governmental organization in Bahrain with special consultative status to the United Nations Economic and Social Council. BWA's vision is to empower leaders for the human development era. One of BWA's main goals is to modify the existing laws regarding women and nationality in Bahrain. BWA aims to contribute to the development of legislation that supports women and their rights and to raise awareness to eradicate negative attitudes and practices against women.

Ethiopian Women Lawyers Association (EWLA) is a non-governmental organization based in Addis Ababa, working for the protection and promotion of women's rights in Ethiopia. The organization is engaged in various legislative initiatives, particularly in relation to family law and laws relating to violence against women. The organization is also engaged in the provision of legal

services to women, and in broader educational initiatives for the promotion of legal literacy among women in Ethiopia.

Forum for Women, Law and Development (FWLD) is an autonomous, non-profit, non-governmental organization established in 1995 in Kathmandu, Nepal. FWLD is committed to promoting, protecting and fulfilling the human rights of women and marginalized groups. One of FWLD's major objectives is to facilitate the amendment of discriminatory laws in Nepal to ensure an equal and just society. FWLD is continuously working on the reformation of law and policy and its effective implementation resulting in a real-life positive impact on the target population. FWLD has been involved in a number of test cases on equality issues using international law in the domestic courts of Nepal and is currently conducting a study on access to justice in Nepal with a view to assessing how justice can be made more accessible. FWLD has submitted shadow reports to the United Nations Committee on the Elimination of Discrimination against Women on the implementation of the government of Nepal's obligations under the Convention on the Elimination of All Forms of Discrimination against Women.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and responds to violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights

organization based in the U.S. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

The International Human Rights Law Clinic at the University of Virginia School of Law (U.Va. Clinic) gives students direct, practical experience in human rights advocacy under the supervision of international human rights lawyers. Projects are chosen to help students build the knowledge and skills necessary to be effective human rights lawyers and to integrate the theory and practice of human rights. The U.Va. Clinic collaborates with non-governmental organizations and individual advocates on a wide range of human rights issues through various means, including litigation. The U.Va. Clinic's work regularly involves comparative legal analyses and international law analyses of alleged human rights violations or domestic legislation.

International Women's Rights Action Watch (IWRAW) was founded in 1985 and is affiliated with the University of Minnesota Human Rights Center, based at the Law School. IWRAW is a resource and communication center focusing on the implementation of women's human rights under the UN human rights treaties. It pioneered shadow reporting on the status of women in countries under

review by the United Nations Committee on the Elimination of Discrimination against Women and other treaty monitoring bodies and provides technical assistance on treaty implementation.

International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific) is an international non-governmental organization established in Kuala Lumpur, Malaysia, in 1993. IWRAW Asia Pacific works toward the progressive interpretation, implementation, and realization of the human rights of women through the lens of the United Nations Convention on the Elimination Against All Forms of Discrimination Against Women (CEDAW Convention) and other international human rights treaties. IWRAW Asia Pacific promotes the domestic implementation of international human rights standards by building the capacity of women and human rights advocates to claim and realize women's human rights. The organization has worked consistently with the CEDAW Convention and its Committee to support the recognition and enjoyment of women's human rights in national contexts, by facilitating the participation of women from national organizations in over 120 countries in the CEDAW review process.

The Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), founded in 1987, is a regional network of individuals and non-governmental organizations based in Lima, Peru with affiliates in fourteen countries working for the full enjoyment of women's rights, based on principles of equality and non-

discrimination, among others. CLADEM has had consultative status with the United Nations since 1995 and was authorized to take part in activities at the Organization of American States in 2002. CLADEM promotes the drafting and approval of international and regional human rights instruments, and it holds governments accountable for the lack of implementation of women's human rights standards by submitting reports as well as filing strategic litigation cases at the national and international levels. In March 2009, CLADEM was awarded the King of Spain Human Rights Prize.

Women in Law and Development in Africa (WiLDAF) is a pan-African, non-governmental organization working to bring together organizations and individuals using law to promote and protect women's rights in African countries. WiLDAF's goal is to promote the effective use of legal strategies by women in Africa for self, community and national development. The organization, which was established in 1990, has chapters in 21 countries of Africa. The Regional Office is based in Lusaka, Zambia.

AMICUS CURIAE BRIEF

No. 09-5801

In The
Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

MICHAEL M. HETHMON*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org

Attorney for the Amicus Curiae
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE PLENARY POWER DOCTRINE OVER CITIZENSHIP IS WELL-ESTABLISHED BY THE COURT 4

II. HISTORY AFFIRMS THE COURT'S PLENARY POWER DOCTRINE AS IT CONCERNS CITIZENSHIP 6

III. THE PLENARY POWER DOCTRINE IS PART OF THE ANGLO-AMERICAN TRADITION 7

A. The Anglo Origins of the Plenary Power Doctrine and the Doctrine of Allegiance 8

B. Blackstone, Vattel, and Eighteenth Century Legal Commentators Support the Court's Plenary Power Doctrine Concerning Citizenship 12

C. The Framers' Understanding of the Rules Concerning Citizenship, the Constitution, and Early Constitutional Commentary Support the Court's Precedent on the Plenary Power Doctrine 17

TABLE OF CONTENTS – Continued

Page

D. The History of the Constitution's Ratification Supports the Court's Plenary Power Doctrine Concerning Citizenship 21

E. The Political Discourse Concerning the 1798 Alien Act Supports the Court's Plenary Power Doctrine Concerning Citizenship 24

F. The Jurisprudence of John Jay, John Marshall, and Alexander Addison Support the Court's Plenary Power Doctrine 28

IV. THE RATIFIERS OF THE FOURTEENTH AMENDMENT DID NOT SEEK TO ALTER CONGRESSIONAL PLENARY POWER OVER CITIZENSHIP OR APPLY THE EQUAL PROTECTION CLAUSE TO THE PLENARY POWER DOCTRINE 33

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES

Calvin's Case, 7 Coke. 1186 (1608) 10

Elk v. Wilkins, 112 U.S. 94 (1884) 8

Hamilton v. Dillon, 88 U.S. 73 (1875) 4

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 4

INS v. Chadha, 462 U.S. 919 (1983) 4, 7

INS v. Pangilinan, 486 U.S. 875 (1998) 4

Matthews v. Diaz, 426 U.S. 67 (1976) 4

McCulloch v. Maryland, 36 U.S. 316 (1819) 30

Miller v. Albright, 523 U.S. 420 (1998) 4

Nguyen v. INS, 533 U.S. 53 (2001) 3, 5

Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) 8

Plyer v. Doe, 457 U.S. 202 (1982) 4

Rogers v. Bellei, 401 U.S. 815 (1971) 4

United States ex rel. Turner v. Williams, 194 U.S. 279 (1904) 7

United States v. Fisher, 6 U.S. 358 (1805) 30

United States v. Wong Kim Ark, 169 U.S. 649 (1898) 3, 4, 8, 39, 40

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AUTHORITIES

ARTICLES OF CONFEDERATION, ARTICLE IV (1781).....17

U.S. CONST. Article I § 8 .....*passim*

U.S. CONST. Amend. V 3, 5

U.S. CONST. Amend. XIV .....*passim*

U.S. CONST. Amend. XIV, § 1 .....3, 4, 36, 40

U.S. CONST. Amend. XIV, § 5 40

LAWS, STATUTES, AND TREATIES

21 Hen. 8, c. 16 (1529) (Eng.) 10

32 Hen. 8, c. 16 (1540) (Eng.) 9, 10

4 & 5 P. & M., c. 6 (1557-8) (Eng.) 10

7 Jac. 1, c. 2 (1609-10) (Eng.) 10

33 Geo. 3, c. 4 (1793) (Eng.) 15

1 U.S. STAT. 103 (1790) 16, 25

1 U.S. STAT. 577 (1798) 25

2 U.S. STAT. 153 (1802) 16

8 U.S.C. § 1401(a)(7) 6, 7

8 U.S.C. § 1409(a) 5, 6, 7

8 U.S.C. § 1409(c) 6, 7

TREATY OF PARIS (1783) 22

TABLE OF AUTHORITIES – Continued

Page

CONGRESSIONAL RECORDS

8 ANNALS OF CONGRESS (1798) 25, 27

37 CONG. GLOBE (1862) 34

39 CONG. GLOBE (1866) 35, 37, 38, 39

OTHER AUTHORITIES

ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY (1800) 31, 32, 33

ALEXANDER ADDISON, ON THE ALIEN ACT (1799).....31, 32

AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE (1799) 25, 26, 27

Andrew C. Lænner, *John Taylor and the Origins of American Federalism*, 17 J. OF THE EARLY REPUBLIC 399 (1997) 14

Andrew C. Lænner, *Separate Spheres: Republicanism Constitutionalism in the Federalist Era*, 41 AMER. J. LEGAL HISTORY 254 (1997) 14, 21, 25

BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN (1834) 14

1 BLACKSTONE'S COMMENTARIES (St. George Tucker ed., 1803) 18

Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008) 36

TABLE OF AUTHORITIES – Continued

Page

DANIEL DEFOE, SOME SEASONABLE QUERIES, ON THE THIRD HEAD, VIZ. A GENERAL NATURALIZATION (1697) 12

DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC (1985) 21, 25

1 EMER DE VATTEL, THE LAW OF NATIONS (Knud Haakonssen ed., 2008) 15, 32

2 EMER DE VATTEL, THE LAW OF NATIONS (Knud Haakonssen ed., 2008) 16, 32

FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT (1641) 10, 11

HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Francis W. Kelsey ed., 1925) 9

JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978) 14

James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AMER. J. LEGAL HISTORY 208 (1974) 14, 22

JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt, James Scott eds., 1920) 22

JOHN JAY, THE CHARGE OF CHIEF JUSTICE JAY TO THE GRAND JURIES ON THE EASTERN CIRCUIT (1790) 29

TABLE OF AUTHORITIES – Continued

Page

5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (1807) 30

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) 19, 23

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Thomas M. Cooley ed., 1873) 20

Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1989) 8

1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 76 (6th ed., 1793) 13

MOSES MATHER, AMERICA'S APPEAL TO THE IMPARTIAL WORLD (1775) 18

OBSERVATIONS ON THE ALIEN & SEDITION LAWS OF THE UNITED STATES (1799) 15, 26

Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616865 .....30, 31

Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619372 .....33, 34, 36, 40

TABLE OF AUTHORITIES – Continued

Page

Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: A Historical Perspective*, 15 TEX. REV. L. & POL. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618976 ..... *passim*

PETER AND NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTION, 1776-1814 (1993) 12, 14, 21, 22

Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015 (2008) 36

REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS TO THE RIGHTS OF CITIZENSHIP WHO RESIDED WITHIN THE UNITED STATES ONE YEAR PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (March 18, 1822) 16

Ruth Bader Ginsburg, Associate Justice, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Address at International Academy of Comparative Law American University (July 30, 2010, *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_07_30_10.html 32

ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS (1799) 14

TABLE OF AUTHORITIES – Continued

Page

ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION WITH SELECTED WRITINGS (Clyde N. Wilson fwd., 1999) 17, 19, 33

THE CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793 29

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1836) 23, 25

5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1845) 23, 24

4 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1962) 24

5 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1962) 24

9 THE PAPERS OF JAMES MADISON (Robert A. Rutland ed., 1975) 14

12 THE PAPERS OF JAMES MADISON (Robert A. Rutland ed., 1979) 27

15 THE PAPERS OF JAMES MADISON (Thomas A. Mason ed., 1985) 27

8 THE WRITINGS OF JAMES MADISON (Galliard Hunt ed., 1908) 28

THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN & SEDITION LAWS (1798) 14, 25

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 13, 14

TABLE OF AUTHORITIES – Continued

Page

4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d ed., 1966) 9, 10, 11

9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d ed., 1966) 10

10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d. ed., 1966).....13

William Ty Mayton, *Birthright Citzenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008).....36

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1829) 19, 23, 25

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Immigration Reform Law Institute (IRLI) is a legal non-profit 501(c)(3) corporation specializing in immigration law. *Amicus Curiae* believe that because Congress has unquestioned plenary authority to prescribe the rules of citizenship, immigration, naturalization and foreign affairs, as laid out by this Court's long established Plenary Doctrine, Petitioners are prevented from seeking relief in this case.

Amicus Curiae has an interest in the Court having a well-informed and accurate understanding of the Plenary Power Doctrine through the Anglo-American legal tradition, the history of the Constitution, and the history of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The question presented is whether Congress, in its plenary authority to prescribe the rules of citizenship, has the authority to distinguish rules for

[1] Pursuant to this Court's Rule 37.6, *Amicus Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

citizenship at birth according to gender, and whether such a classification by Congress is subject to judicial review. Petitioners argue: "The "plenary power" doctrine, which the Court has applied in the context of the entry of aliens into the United States, does not warrant some lesser standard of scrutiny, because acquisition of citizenship at birth is fundamentally different from the immigration or naturalization of an alien." Pet. Br. 4. Petitioners further assert that "even if the plenary power doctrine applies, the classification does not exempt congressional action in that area from constitutional scrutiny." *Id.*

Despite these claims of the Petitioners and their accompanying *amici*, the Plenary Power Doctrine as it concerns the rules of citizenship is not subject to a different constitutional standard of scrutiny than the other areas touching upon the Plenary Power Doctrine – immigration, naturalization, and foreign affairs. *See* Res. Br. 14-20. Neither the Founding Fathers nor the ratifiers of the Fourteenth Amendment sought to limit congressional plenary power over citizenship, immigration, naturalization, or foreign affairs. Congressional authority in these areas of law was considered as integrally related under every nation's right of self-preservation as understood through the law of nations.

The historical and legal evidence available from the years when the Constitution was framed and the Fourteenth Amendment was ratified affirms that this Court's long standing precedent on the Plenary Power

Doctrine concerning citizenship is correct and what the Constitution commands.

Neither the Fifth Amendment's equal protection guarantee nor the Fourteenth Amendment's Equal Protection Clause was ever intended to have any bearing on the Plenary Power Doctrine. While the Fourteenth Amendment prescribes a constitutional minimum guarantee for citizenship at birth, it is not a broad command. Instead, it is a reaffirmation of the Founding Fathers' understanding of the rules of citizenship. The Fourteenth Amendment guarantees that Congress cannot deny citizenship by birth to persons who are "subject to the jurisdiction thereof" and born in the territorial United States. U.S. CONST. Amend. XIV, § 1; *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).

All legal and historical sources support the view that to be "subject to the jurisdiction thereof" means subject to the "complete jurisdiction" of the sovereign. Through the long-standing doctrine of allegiance and every nation's sovereign right of self-preservation, the ratifiers of the Fourteenth Amendment intended that Congress retain plenary authority to define whether persons are "subject to the jurisdiction thereof" through the doctrine of allegiance, *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (when determining an individual's "ties and allegiances, it is for Congress, not this Court, to make that determination"), and its plenary power over citizenship.

ARGUMENT

I. THE PLENARY POWER DOCTRINE OVER CITIZENSHIP IS WELL-ESTABLISHED BY THE COURT

Since the late nineteenth century, the Supreme Court has repeatedly affirmed that Congress alone has plenary power to prescribe the rules conferring United States citizenship. *Hamilton v. Dillon*, 88 U.S. 73, 92 (1875); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Matthews v. Diaz*, 426 U.S. 67 (1976); *Plyer v. Doe*, 457 U.S. 202, 225 (1982); *INS v. Chadha*, 462 U.S. 919, 940 (1983). The Court has also held that this power is not subject to the limitations set forth in Section 1 of the Fourteenth Amendment, including the Equal Protection Clause. *Wong Kim Ark*, 169 U.S. at 688 (Section 1 "has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution"); *Rogers v. Bellei*, 401 U.S. 815, 830 (1971).

In the last fifteen years, the Court's decisions have not strayed from this precedent. In *INS v. Pangilinan*, 486 U.S. 875, 885 (1998), the Court held, "Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship[.]" *See also Miller v. Albright*, 523 U.S. 420, 456 (1998) (Scalia, J., concurring) ("only Congress has the power to set the requirements for the acquisition of citizenship by persons not born within

the territory of the United States, federal courts cannot exercise that power").

Conversely, Petitioners assert that congressional plenary authority over citizenship is distinct from plenary authority over immigration and should be subject to constitutional scrutiny[2] under the Fifth Amendment's equal protection guarantee or the Fourteenth Amendment's Equal Protection Clause. Pet. Br. 7-19, 44-62. Petitioners cite to *Nguyen*, 533 U.S. at 60, in which that Court applied intermediate scrutiny to a gender-based classification for citizenship. However, at no point in *Nguyen* did the Court overturn its previous decisions affirming congressional plenary power to confer the rules of citizenship. Instead, the Court held that it "need not assess . . . our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power" because 8 U.S.C. § 1409(a) would survive the applicable equal protection scrutiny absent the Plenary Power Doctrine. *Nguyen*, 533 U.S. at 72-73.

[2] The Brief for the United States argues for congressional deference and that a "rational basis" standard of review applies. Res. Br. 8, 22, 31. This Court has never applied a level of constitutional scrutiny to the Plenary Power Doctrine concerning citizenship. *Nguyen*, 533 U.S. at 72-73 (affirming the Plenary Power Doctrine concerning citizenship was not overturned).

II. HISTORY AFFIRMS THE COURT'S PLENARY POWER DOCTRINE AS IT CONCERNS CITIZENSHIP

From our Anglo-American legal beginnings, this Court's Plenary Power Doctrine is affirmed through an historical approach. This history affirms that the Court should uphold its longs standing precedent that Congress has plenary power to prescribe the rules conferring United States citizenship. As the historical and legal evidence set forth below demonstrates, the Founding Fathers adopted the Constitution to centralize authority over citizenship, immigration, naturalization, and foreign affairs with the federal government, for these areas of plenary authority were interrelated within the law of nations. *See* Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: A Historical Perspective*, 15 TEX. REV. L. & POL. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618976, at 7-38.

The fact that former 8 U.S.C. § 1401(a)(7) and 8 U.S.C. §§ 1409(a), (c) distinguish citizenship based on gender has no bearing on the constitutionality of these laws, for the Founders meant to confer upon Congress unfettered plenary authority over the rules of citizenship based upon the consent of the Union. *Id.* at 22-30. The power to prescribe the rules of citizenship is a matter of national sovereignty. This power is intertwined with the right of self-preservation, the

doctrine of allegiance, and the law of nations as prescribed by the political branches.[3]

III. THE PLENARY POWER DOCTRINE IS PART OF OUR ANGLO-AMERICAN TRADITION

In accordance with the Founders' understanding of the Constitution, this Court has held that through the text of the Constitution and every nation's right of self-preservation, Congress has plenary power over citizenship, immigration, naturalization, and foreign affairs. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904) (it is an "accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners . . . or to admit them . . . upon such conditions as it may see fit to prescribe"); *Chadha*, 462 U.S. at 940.

Despite this understanding, legal commentators have asserted that the Plenary Power Doctrine is a judicial fiction and subject to the limitations set forth in the Bill of Rights and the Fourteenth Amendment.

---

[3] *Amici Curiae* Professors of History, Political Science, and Law assert that gender based citizenship law are "archaic assumptions" that "run afoul of well-established constitutional principles[.]" Br. Of Amici Curiae Professors of History, Political Science, and Law at 1-2. Whether or not 8 U.S.C. §§ 1401 and 1409 are "archaic" is irrelevant when Congress has legislated in an area of plenary authority.

See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 854-57 (1989). These claims are without legal or historical merit.

An historical approach supports this Court's long-standing precedent, reveals that the Plenary Power Doctrine is deeply-rooted in Anglo-American history, that the Constitution's Framers intended Congress to have unfettered authority in the areas of citizenship, immigration, naturalization, and foreign affairs, and that these areas were all intimately interwoven. In particular, the Framers understood that the Constitution grants Congress exclusive authority to prescribe the rules of citizenship, which are historically and legally based on the long standing doctrine of allegiance.[4]

A. The Anglo Origins of the Plenary Power Doctrine and the Doctrine of Allegiance

The Founders' understanding of the Plenary Power Doctrine, as the Founders understood it, over the rules of citizenship can be traced back to Hugo Grotius (1583-1645) and can be found in England's

---

[4] The Court has acknowledged the importance of the doctrine of allegiance in multiple cases. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *Wong Kim Ark*, 169 U.S. at 655-67; *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 396 (1927).

Statutes of the Realm from the inception of the Magna Charta to the early seventeenth century. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 201-2, 819, 857 (Francis W. Kelsey ed., 1925). This plenary authority is interwoven with every nation's right of self-preservation, its power over foreign affairs, and the well-established doctrine of allegiance. *See* Charles, *The Plenary Power Doctrine*, *supra*, at 5-21 (discussing the Anglo and international origins of the Plenary Power Doctrine).

In England, the doctrine of allegiance was essential for defining the rights of an individual, and determining whether such a person was entitled to the status of a subject, alien, or denizen. Allegiance was of such importance to English law that it was even a prerequisite to conduct trade or enter the realm. *See* 32 Hen. 8, c. 16, §§ 1, 3 (1540) (Eng.) ("ev[er]y alien and straungier borne out of the Kinges obe[die]nce . . . [is to be] bounden by and unto the lawes and statut[e]s of this realme").

Nothing in England's historical, legal, or statutory record suggests anything other than that Parliament and the crown possessed unchecked plenary power over citizenship and the entrance of persons born out of the sovereign's allegiance. *See* 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 335-36 (2d ed., 1966). It was well-established that persons born outside the realm were subject to rules of law which differed significantly from the English common law,

including the rights of subjects.[5] Aliens could not immediately claim the rights and liberties of the English subject, because the government had plenary authority to treat them as it pleased. *Id.* at 335.

As early as 1608 the King's Bench addressed the importance of the doctrine of allegiance concerning the rights of individuals born outside the crown's allegiance. *See Calvin's Case*, 7 Coke. 1186 (1608). In *Calvin's Case*, the Court held that although the alien had lived his entire life in England, and had sworn allegiance to the king, if "an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject." 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 92 (2d ed., 1966).

The development of the doctrine of allegiance in defining citizenship and the laws concerning immigration, naturalization, and foreign affairs reached its height during the seventeenth century. For instance, in 1641, Sir Francis Bacon stated that the "priviledge of *Naturalization*, followeth *Allegeance*, and that *allegeance* followeth the *Kingdome*." FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT 15 (1641). Citing Sir Thomas Littleton's 1481 treatise *On Tenures*, Bacon

---

[5] 32 Hen. 8, c. 16, § 1 (1540) (Eng.); 21 Hen. 8, c. 16, § 1 (1529) (Eng.); 4 & 5 P. & M., c. 6, §§ 1, 2 (1557-8) (Eng.); 7 Jac. 1, c. 2 (1609-10) (Eng.).

defined an alien as any person "which is born out the allegeance of our *Lord the King*." *Id.* at 37.

The popular print culture of the seventeenth century also reveals the importance of the doctrine of allegiance, and describes the plenary authority of the political branches over citizenship, immigration, and naturalization as unquestioned. Charles, *The Plenary Power Doctrine*, *supra*, at 11-13. The only matter of legal dispute was the distribution of power between the political branches – i.e., the crown and Parliament. BACON, *supra*, at 15-16; 4 HOLDSWORTH, *supra*, at 335 36. Not one pamphlet or broadside, including those by proponents of naturalizing foreigners, questioned the government's plenary authority to grant citizenship or define the rights afforded aliens. In fact, many political pamphlets posed the argument that foreigners should not be naturalized or permitted to settle due to allegiance conflicts between their nation of origin and that of England. Charles, *The Plenary Power Doctrine*, *supra*, at 11-13.

What these pamphlets reveal is that the plenary power over citizenship, immigration, and naturalization were intimately related and considered to rest with the political branches in England. Such power was based on the international premise that a sovereign government must possess the power of self-preservation, which included the tenets of the doctrine of allegiance. *Id.* Determining the allegiance of foreigners was the entire legal basis by which foreigners were permitted to settle, obtain citizenship, and the rights of subjects. It was a power inherent to

national sovereignty within the political branches of England and could not be questioned.[6]

Even seventeenth century proponents of liberalizing England's immigration and naturalization policies, such as Daniel Defoe, recognized this legal fact. Defoe was for encouraging foreigners to settle, but only those that would "hazard[ ] their lives to save our Liberties" because the "strength of England augmented by such a considerable Accession of zealous Protestants" would "defend our Rights and Liberties as their own[.]" DANIEL DEFOE, SOME SEASONABLE QUERIES, ON THE THIRD HEAD, VIZ. A GENERAL NATURALIZATION 3 (1697). In other words, Defoe supported the settling of only those foreigners that would not pose a danger to the safety of the realm, and knew this determination was a matter left to the political branches because it concerned governmental plenary authority over citizenship, immigration, naturalization, and foreign affairs.

B. Blackstone, Vattel, and Other Eighteenth Century Legal Commentators Support the Court's Plenary Power Doctrine Concerning Citizenship

Eighteenth century legal treatises all attest to the prominence of the Plenary Power Doctrine over

---

[6] PETER AND NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTION, 1776-1814, at 15 (1993).

citizenship, immigration, naturalization, foreign affairs, and they were all interwoven with the doctrine of allegiance.[7] In Matthew Bacon's *A New Abridgement of the Law* it defines an alien as "one born in a strange Country and different Society[.]" 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 76 (6th ed., 1793). Bacon further wrote the "Policy of our Constitution has established several Laws . . . that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy[.]" *Id.*

William Blackstone similarly discussed the importance of the doctrine of allegiance and aliens submitting to a nation's laws as a requirement to obtain entry, citizenship, or the rights of subjects. He wrote that allegiance "both express and implied, is the duty of all the king's subjects" and others residing or travelling within the realm. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (1765). He defined an alien as "one who is born out of the king's dominions, or allegiance[.]" *Id.* at 361. Regarding plenary power over citizenship, immigration, naturalization, and foreign affairs, Blackstone wrote:

> [B]y the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves,

---

[7] For a summary, *see* 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 395-98 (2d ed., 1966).

> that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient[.]

Id. at 251. Blackstone makes it clear that a foreigner's admission into the community either as a resident or citizen is a privilege, not a right or remedy, and is dependent upon the laws of the respective political branches of government. While Blackstone admits in his commentaries that the English statutes were generous to foreigners entering the realm, entry and settlement were conditioned on "behave[ing] peaceably," a determination that can only be defined by the political branches. *Id.* at 252.

The most influential legal commentator on the law of nations was Emer De Vattel and his impact on England, the American colonies, and the Founding Fathers is undisputed.[8] Vattel viewed the admission

---

[8] *See* BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834); 9 THE PAPERS OF JAMES MADISON 223 (Robert A. Rutland ed., 1975); Andrew Lenner, *Separate Spheres: Republicanism Constitutionalism in the Federalist Era*, 41 AMER. J. LEGAL HISTORY 254, 259 (1997), James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AMER. J. LEGAL HISTORY 208, 219 (1974); Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399, 406, 408, 411 (1997); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 188 (1978); ONUF, FEDERAL UNION, *supra*, at 123-44. For examples of eighteenth century analysis of Vattel, *see generally* ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS (1799); THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN AND SEDITION LAWS (1798);

(Continued on following page)

of aliens as a privilege – not a right or a remedy. 1 EMER DE VATTEL, THE LAW OF NATIONS § 213 (Knud Haakonssen ed., 2008) ("The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country."). In exchange for permission to "settle and stay," aliens were "bound to the society by their residence . . . subject to the laws of the state[.]" *Id.* Such allegiances were required even though a permitted alien did "not participate in all the rights of citizens." *Id.*

According to Vattel, the key to whether a foreigner was granted the privileges and rights of a nation rested upon whether an alien had permission to *settle*. To accomplish this requirement, the alien must adhere to the nation's regulations, *id.* at § 214, and establish "a fixed residence in any place with an intention of always staying there," *id.* at § 218. Indeed, this residence was conditioned by the permission of a nation's government. A "man does not . . . establish his settlement . . . unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration" to the sovereign government. *Id.*

Parliament would include these legal premises concerning allegiance and submission to the laws in its 1793 Alien Bill just as the United States would include them in its first naturalization laws. *See* 33

OBSERVATIONS ON THE ALIEN AND SEDITION LAWS OF THE UNITED STATES (1799)

Geo. 3, c. 4 (1793) (Eng.); 1 U.S. Stat. 103 (1790); 2 U.S. Stat. 153-54 (1802). In 1822, the Committee of the Judiciary reiterated this premise, stating that to "dispense with [the declaration of the intent to *settle*] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission[.]" REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS . . . PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (March 18, 1822).

These commentaries establish that in the eighteenth century, the law of nations stipulated that the rules of citizenship were dependent upon the plenary authority of the political branches. Charles, *The Plenary Power Doctrine*, *supra*, at 5-21. Furthermore, the law of nations, which includes every sovereign nation's right of self-preservation, subjected foreigners to the will of the government and often to additional legal requirements as a condition of settling, the enjoyment of most rights and privileges, and the obtainment of citizenship. *Id.* As Vattel stated, "the public safety, [and] the rights of the nation . . . necessarily require" it. 2 EMER DE VATTEL, THE LAW OF NATIONS § 101 (Knud Haakonssen ed., 2008).

C. The Framers' Understanding of the Rules Concerning Citizenship, the Constitution, and Early Constitutional Commentary Support the Court's Precedent on the Plenary Power Doctrine

The Constitution states that Congress "shall have power to establish a uniform rule of naturalization" – a clause that was accepted without objection because the Articles of Confederation had created a citizenship dilemma. ARTICLES OF CONFEDERATION, Art. IV (1781). The Articles contained no mention of who possessed the authority to naturalize aliens or define the rules of citizenship. Thus, each State could impose national citizenship upon the other States without their consent. As St. George Tucker phrased it in *A View of the Constitution*, "residence for a short time [in one State] conferred all the rights of citizenship" in another. It did not matter that another State passed laws that "legally incapacitated" aliens for "certain rights," for the law of the lenient state was "preposterously rendered paramount" to the State that had adopted firm naturalization protections. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 197 (Clyde N. Wilson fwd., 1999).

These problems were fixed with the adoption of the Constitution, for it expressly granted Congress exclusive authority to prescribe the rules of naturalization and citizenship, which included authority over immigration. While the change came with minor interpretational differences, the Naturalization Clause

was generally interpreted as conferring upon Congress unquestionable authority to regulate the rules of citizenship. Charles, *The Plenary Power Doctrine*, *supra*, at 23-28.

Naturally, this power was intertwined with the doctrine of allegiance as understood from our Anglo origins.[9] In a 1775 tract entitled *America's Appeals to the Impartial World*, Connecticut patriot Moses Mather discussed the three forms of allegiance that existed in the late eighteenth century – "natural, acquired, and local[.]" MOSES MATHER, AMERICA'S APPEAL TO THE IMPARTIAL WORLD 16 (1775). Acquired allegiance occurred upon the naturalization of the individual. *Id.* "[L]ocal temporary allegiance" was what is required by every "alien friend" that "comes into the realm to reside for a time" by adhering to the laws. *Id.* Lastly, "natural allegiance" is that which is acquired by birth, "inheritable to the laws, intitled to the immunities of the government, and the protection of the king[.]" *Id.*

The power to determine these qualifications of allegiance have always rested with the sovereign government. In England, this power rested with the political branches of government. The Founding Fathers borrowed this concept by divesting exclusive plenary power to define the laws of citizenship,

---

[9] *See* 1 BLACKSTONE'S COMMENTARIES § 372 (St. George Tucker ed., 1803).

immigration, and naturalization with Congress. Charles, *The Plenary Power Doctrine*, *supra*, at 5-30.

Early constitutional commentators are in agreement on this fact. St. George Tucker listed congressional power to prescribe the terms of citizenship as being "exclusively granted to the federal government." TUCKER, VIEW OF THE CONSTITUTION, *supra*, at 129, 131. William Rawle addressed how the doctrine of allegiance was the entire basis of obtaining legal citizenship. He asserted that since naturalization is the "mode of acquiring the right" of citizenship and "is the factitious substitution of legal form for actual birth," individuals born outside the United States owe due allegiance to rules. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 98 (1829).

Justice Joseph Story similarly stated that Congress has plenary power to regulate citizenship and naturalization. Story wrote that such power "must be exclusive; for a concurrent power in the States would bring back all the evils and embarrassments which the uniform rule of the Constitution was designed to remedy." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 538 (1833). He went on to write that the use of the language *establish*, which exists in the Naturalization Clause, must be given "the liberal interpretation of the clause." *Id.* at § 554. Story used the Congressional power to *establish* Post-Offices and Post-Roads as an example. Story noted that the power to *establish* these had been interpreted by some as merely a power to define

"where post-offices shall be kept" and "designate or point out, what roads shall be mail-roads, and the right of passage." *Id.* at § 553. However, Story explained that such an interpretation "has never been understood to be limited." *Id.* Instead, *establish* has "constantly had the more expanded sense of the word." *Id.*

In 1873, Thomas M. Cooley elaborated on Story's interpretation. Cooley defined *establish* as "to settle firmly, to confirm, to fix, to form or modify, to found, to build firmly, to erect permanently." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1130 (Thomas M. Cooley ed., 1873). These uses were the types that could be found in "legislative acts, in state papers, and in the Constitution itself." *Id.* Cooley also noted that the Constitution's preamble uses the word *establish* in a general sense by speaking "of one motive being 'to *establish* justice,' and that people do *ordain* and *establish* this Constitution." *Id.* at § 1131. Thus, Cooley believed *establish* meant "to create, and form, and fix in a settled matter." *Id.*

In sum, the power to *establish* was to be understood in the most liberal and general sense. As Cooley stated, "whatever is appropriate to this purpose, is within the power." *Id.* Like Story before him, Cooley saw the Congressional power to "establish a uniform rule of naturalization" as unlimited. Congress had the "power to exhaust[ ] it so far as respects the individual," *id.* at § 1655, and this power extended to rules concerning citizenship and immigration.

D. The History of the Constitution's Ratification Supports the Court's Plenary Power Doctrine Concerning Citizenship

The historical consensus is that the Constitution was adopted, in part, to correct the problems that the Articles of Confederation posed in relation to citizenship, naturalization, foreign policy, and immigration. *See* ONUF, FEDERAL UNION, *supra*, at 113-44; DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 80-86 (1985); Lenner, *Separate Spheres*, *supra*, at 253-56. The Constitution insures that the political branches possess the traditional attributes of national sovereignty as prescribed by the law of nations. In particular, the law of nations was thought to be "an inherent attribute of sovereignty" and "constituted a vital source of federal policy." *Id.* at 256. The law of nations is particularly significant in understanding congressional power to prescribe the rules of citizenship because the Founders were influenced by its tenets in drafting the Constitution. Charles, *The Plenary Power Doctrine*, *supra*, at 23-30.

Indeed, the Founding Fathers were acutely aware of the tenets of international law well before the drafting of the Constitution. For instance, the Founders had to be familiar with the law of nations when they negotiated the 1783 Treaty of Paris, which addressed immigration matters when it distinguished

between the "real British subjects"[19] and American citizens based on the doctrine of allegiance. Kettner, *The Development of American Citizenship*, *supra*, at 241. Moreover, the repeated failures of the Articles of Confederation respecting international relations were well known. Despite international agreements with other nations, countries like England were able to frustrate the United States' diplomatic relations. ONUF, FEDERAL UNION, *supra*, at 94-95. Thus, the disparity between the laws of the States respecting international relations, including the rules of naturalization and citizenship, was an influential factor in dispensing with the Articles of Confederation.

Regarding the rules of naturalization, as early as April 1787, James Madison wrote to George Washington about the importance of the federal government "fixing the terms of and forms of naturalization." Madison felt it was a power that was "absolutely necessary" to be placed with the federal government in order to avert the States from "harass[ing] each other with rival and spiteful measures" and to prevent "the aggressions of interested majorities on the rights of minorities and of individuals." JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 593-94 (Gaillard Hunt, James Scott eds., 1920). The North Carolina Constitutional Convention also supported granting the federal

[19] TREATY OF PARIS, ART. V (1783)

government such plenary power because it was "the means of preserving the peace and tranquility of the Union." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 19-20 (Jonathan Elliot ed., 1836). It was well known by the Founders that the "encroachments of some states on the rights of others, and all of those of the Confederacy, [on the rules of immigration, citizenship, and naturalization] are incontestable proofs" of the weakness of the Articles of Confederation. *Id.*; *see also* TUCKER, A VIEW OF THE CONSTITUTION, *supra*, at 197-98; RAWLE, *supra*, at 85; STORY, COMMENTARIES, *supra*, at § 537.

These issues and discrepancies among the States were elaborated at the 1787 Constitutional Convention. Madison supported including the Naturalization Clause because he viewed it as the power to "fix different periods of residence" to gain citizenship. 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 398 (Jonathan Elliot ed., 1845). Madison's views were not shared by all. Many were concerned with the effect such federal power would have on foreigners who were already residing in the United States. Many aliens had already established residency according to State law under the belief that they would be permitted to remain and be admitted as citizens. Roger Sherman addressed this concern, stating, "The United States have not invited foreigners, nor pledged their faith that they should enjoy equal privileges with native citizens." Conveying the principle that

matters in national concern were about "We the people" and not the respective States, Sherman stated that it was up to Congress to "make any discriminations [it] may judge requisite." *Id.* at 412-13.

Alexander Hamilton's notes at the 1787 Constitutional Convention reveal more of the same. Hamilton viewed congressional power over citizenship and naturalization as necessary to protect American government. He scribbled in his notes on the Convention, "The right of determining the rule of naturalization will then leave a discretion to the [federal] Legislature on this subject which will answer every purpose." 4 THE PAPERS OF ALEXANDER HAMILTON 234 (Harold C. Syrett ed., 1962). Hamilton confirmed such congressional plenary authority at the 1788 New York Convention. In the discussion over the federal government's power to tax, Hamilton argued that the federal government's power to tax should be similar to "that of Naturalization That by Construction would give an Exclusive Right[.]" 5 THE PAPERS OF ALEXANDER HAMILTON 127 (Harold C. Syrett ed., 1962).

E. The Political Discourse Concerning the 1798 Alien Act Supports the Court's Plenary Power Doctrine Concerning Citizenship

Despite its frequent characterization as notorious, the contemporary debates, political discourse,

and print culture respecting the 1798 Alien Act[11] provide great insight into the origins of the Plenary Power Doctrine, and the Early Republic's view of rules of citizenship, the Naturalization Clause, the law of nations, and the right of self-preservation.[12] It is often forgotten that the eighteenth century perception of the law of nations was intimately intertwined with the Constitution. Both Federalists and Republicans supported the adoption of the Constitution as essential to America's progression in the international sphere. Lenner, *Separate Spheres, supra,* at 255-56. Furthermore, the international legal thought of commentators such as Puffendorf, Grotius, Vattel, Blackstone, and others were well known among the Founding generation.

William Rawle, for example, recognized that the "law of nations forms a part of the common law of every civilized country," including the United States. RAWLE, *supra*, at 108. Part of this international common law was recognized as being included in the Naturalization Clause. In fact, the Naturalization Clause was frequently cited to support congressional authority to adopt the 1798 Alien Act,[13] which Congress viewed as consistent with every sovereign

---

[11] 1 U.S. STAT. 577-78 (1798).

[12] *See generally* LANG, *supra*.

[13] 8 ANNALS OF CONGRESS 2020 (1798); EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 24-25; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 441.

government's right of self-preservation. Charles, *The Plenary Power Doctrine*, *supra*, at 31-32.

The sovereign right of self-preservation was conveyed in all the international legal treatises of the eighteenth century, to which the political pamphlets concerning the Alien Act attest. *Id.* at 33-34. For instance, one pamphlet attested to the constitutionality of the Alien Act on the grounds that it "attain[ed] the most important of all political ends, the *preservation of our national existence*[.]" EVANS, *supra*, at 15. Similarly, in the pamphlet entitled *Observations on the Alien and Sedition Laws of the United States*, the anonymous author defended the 1798 Alien Act with the right of self-preservation:

> The sovereign may forbid the entrance of his territory, either in general to every stranger, or, in a particular case, to certain persons, or on account of certain affairs . . . The *public safety* and the *rights of the nation* necessarily suppose this condition, and the stranger tacitly submits to it, as soon as he enters the country, and he cannot presume upon having access upon any other footing.

OBSERVATIONS ON THE ALIEN AND SEDITION LAWS, *supra*, at 10. Similar self-preservation arguments can be found in documents such as *An Address of the Minority of the Virginia Legislature*, which stated, "Government is [an] institute and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to

adopt measures for its security[.]" AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE 6-11 (1799).

The House debates on the 1798 Alien Act reveal more of the same. Harrison Gray Otis argued that the Constitution "might as well have never been made" if the federal government cannot exercise authority which is "necessary to its existence[.]" 8 ANNALS OF CONGRESS 1987 (1798). Meanwhile, William Gordon stated the power of self-preservation was the "very existence of Government" itself. He knew that the "sovereign power of every nation possesses it; it is a power possessed by Government to protect itself[.]" *Id.* at 1984.

Not even the 1798 Alien Act's most ardent opponent, James Madison, argued against the federal government's right of self-preservation or congressional plenary authority over the rules of citizenship. In fact, in 1789, Madison advocated that the law defines the "qualities of a citizen or an alien[.]" 12 THE PAPERS OF JAMES MADISON 179 (Robert A. Rutland ed., 1979).

What is particularly significant about Madison's understanding of naturalization, citizenship, and immigration is that he believed it was constitutional for Congress to prescribe class distinctions. For instance, during the 1794-95 debates over a new naturalization bill, Madison supported a proposal making a "distinction" for "one class of emigrants over another, as to the length of time before they would be admitt[ed] citizens[.]" 15 THE PAPERS OF

JAMES MADISON 432 (Thomas A. Mason ed., 1985). Madison made a similar distinction in 1819. Addressing the fact that some alien classes fostered firmer allegiance ties to the United States than other classes, Madison wrote:

> I have been led to think it worth of consideration whether our law of naturalization might not be so varied as to communicate the rights of Citizens by degrees, and in that way, preclude or abridge the abuses committed by [different classes of aliens.]

8 THE WRITINGS OF JAMES MADISON 425 (Galliard Hunt ed., 1908). While Madison knew that these "restrictions would be felt by meritorious individuals, of whom [he] could name some . . . this always happens in precautionary regulations for the general good." *Id.*

F. The Jurisprudence of John Jay, John Marshall, and Alexander Addison Support the Court's Plenary Power Doctrine

The jurisprudence of former Chief Justices John Jay and John Marshall support the Court's long standing jurisprudence on the Plenary Power Doctrine over citizenship, immigration, naturalization, and foreign affairs. In 1793 Chief Justice John Jay delivered a charge to the grand jury to the circuit court of Richmond, Virginia. Relying on Vattel, that "celebrated writer on the law of nations," Jay proclaimed that the

law of all nations includes plenary authority over aliens or what Vattel referred to as "strangers," stating:

> The respect which every nation owes itself, imposes a duty on its government to cause all its laws to be respected and obeyed; and that not only by proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, than that all strangers *admitted* into a country are, during their residence, subject to the laws of it . . . to maintain order and safety . . . It is a manifest consequence of the liberty and independence of nations, that all of them have a right to be governed as they think proper[.]

THE CITY GAZETTE AND DAILY ADVERTISER (Charleston, SC), August 14, 1793, pg. 2, cols. 2-3).[14] The jurisprudence of John Marshall similarly supports congressional plenary authority over citizenship, immigration, naturalization, and foreign affairs. In 1807, Marshall wrote that the Necessary and Proper Clause supports the constitutional interpretation that the federal government has "plenary and sovereign authority" over "*specified powers and objects*," and

[14] *See also* JOHN JAY, THE CHARGE OF CHIEF JUSTICE JAY TO THE GRAND JURIES ON THE EASTERN CIRCUIT 7 (1790) ("We had become a nation – as such we were responsible to others for the observance of the *laws of nations*; and as our national concerns were to be regulated by *national laws*, national tribunals became necessary for the interpretation and execution of them both.").

acknowledges "explicit sanction to the doctrine of implied powers[.]" 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON, app. at 10 (1807) (emphasis added).

In interpreting the Necessary and Proper Clause in *United States v. Fisher*, 6 U.S. 358, 396 (1805), Marshall held that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." This "choice of means" analysis was later used by Marshall in *McCulloch v. Maryland*, 36 U.S. 316 (1819), and has become embedded in our constitutional jurisprudence. Applying this jurisprudence to congressional plenary authority over the rules of citizenship, Marshall would state that Congress has plenary authority to prescribe the "choice of means" to the rules regarding citizenship.

While Marshall never expressly addressed the constitutional scope of the congressional plenary authority over citizenship, immigration, naturalization, and foreign affairs in his opinions, the historical record shows that he borrowed the "choice of means" analysis from former Pennsylvania Judge Alexander Addison whom Marshall respected and who did address congressional scope in these areas of constitutional law. *See* Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616865, at 2, 7-24.

In 1800 Addison defended the constitutionality of the 1798 Alien Act, writing that Congress has "discretion of the choice of means, necessary or proper, for executing their powers" granted by the Constitution. ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 39 (1800). Addison asserted that the "power over the end implies a power over the means; and a power to make laws, for carrying any power into execution[.]" *Id.*

Addison was the only pre-Marshall commentator to analyze the Necessary and Proper Clause under this "choice of means" paradigm and undoubtedly influenced Marshall. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause*, *supra*, at 2, 7-24. Perhaps the first American commentator to define our Constitution's Plenary Power Doctrine, Addison used his "choice of means" doctrine to argue that federal power over citizenship granted Congress the power to "receive [aliens], and admit them to become citizens; or may reject them, or remove them, before they become citizens." ALEXANDER ADDISON, ON THE ALIEN ACT 11 (1799). Addison argued that the "power over aliens is to be measured, not by internal and municipal law, but by external and national law." ADDISON, ANALYSIS, *supra*, at 21.

Similar to how Madison acknowledged how "meritorious" aliens seeking citizenship could be harmed by distinctive naturalization regulations for the general welfare, Addison emphasized that congressional powers over aliens are not judged with how it "affects . . . the [individual] people of the

United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are" and that have relations with the United States. *Id.* Citing Vattel's *Law of Nations*, Addison knew that "every government must be [the] sole judge of what is necessary to be done, for its own safety or advantage, within its own territory." ADDISON, ON THE ALIEN ACT, *supra*, at 2.

To be precise, Addison interpreted the Constitution as including the law of nations as defined by the political branches of government,[15] and believed that discretion should be given to such definitions in determining whether the laws respecting aliens were permissible. *Id.* at 3; *see also* Ruth Bader Ginsburg, Associate Justice, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Address at International Academy of Comparative Law American University (July 30, 2010), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_07_30_10.html (discussing the Framer's inclusion of the law of nations in the Constitution). Addison elaborated:

---

[15] *Amici Curiae* Equality Now et al. claim that current international norms should determine whether Congress may adopt gender based laws concerning citizenship. *See generally* Br. Of Amici Curiae Equality Now et al. Certainly, the Founders had great respect for the law of nations. However, international norms do not override congressional plenary authority to deviate from such norms.

> Nothing appears in the constitution, that can shew, that the people of the United States meant to deny their own government any right, which, by the law of nations, any other sovereignty enjoys with respect to foreign nations. The limits of power of any government, towards its own subjects, were never meant to be applied as limits of power of that government towards the subjects of other governments. And the question, whether a government conducts itself well toward a subject of another government, is not a question of municipal, but of national law[.]

ADDISON, ANALYSIS, *supra*, at 26.

IV. THE RATIFIERS OF THE FOURTEENTH AMENDMENT DID NOT SEEK TO ALTER CONGRESSIONAL PLENARY POWER OVER CITIZENSHIP OR APPLY THE EQUAL PROTECTION CLAUSE TO THE PLENARY POWER DOCTRINE

The members of the Reconstruction Congress understood the tenets of the Plenary Power Doctrine akin to the Founding generation. The contemporaneous debates and public understanding reveal that the drafters of the 1866 Civil Rights Act and the Fourteenth Amendment never intended to limit congressional plenary authority over the rules of citizenship, naturalization, immigration, or foreign affairs. *See* Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J.

PUB. L. (forthcoming fall 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619372, at 27-32. As early as 1862 representative John Bingham acknowledged congressional plenary authority over citizenship and the constitutional restraints on this power, stating:

> All from other lands, who by the terms of [congressional] laws and a compliance with their provisions become naturalized, are adopted citizens of the United States; all other persons born within the Republic owing allegiance to no other sovereignty, are natural born citizens . . . [There is] no exception to this statement touching natural-born citizens except what is said in the Constitution relating to Indians.

37 CONG. GLOBE 1639 (1862). Bingham's statement is significant because it confirms congressional plenary authority over citizenship and that the doctrine of allegiance, as defined by the federal government, was still controlling. Throughout the 1866 debates over the Civil Rights Act and Fourteenth Amendment, members of Congress spoke frequently of the doctrine of allegiance and congressional plenary authority over citizenship; affirming that neither the Equal Protection Clause nor the Bill of Rights was ever intended to apply as restricting the Plenary Power Doctrine. Charles, *Representation Without Documentation?*, *supra*, at 28.

During the congressional debates on whether to grant citizenship to Freedmen, Senator Peter Van

Winkle stated that Congress has "the right to determine who shall be members of our community[.]" 39 CONG. GLOBE 498 (1866). Representative William Niblack defined congressional authority over the rules of naturalization as the "power to admit "aliens," that is persons born out of the jurisdiction and allegiance of the United States, to citizenship[.]" *Id.* at 3216. Meanwhile, Representative William Lawrence declared that Congress has the right to "declare that classes of people" become citizens as "an exercise of authority which belongs to every sovereign Power[.]" *Id.* at 1832. Lawrence further stated:

> As an alien may be deprived of all rights by law, and even excluded from the country, it is the act of naturalization, the condition of national citizenship, that confers on him the civil rights recognized by the Constitution. It is citizenship, therefore, that gives the title to these rights of all citizens. From the very nature of citizenship, the avowed purpose of the founders of our Government, and the interpretation put upon the Constitution, it must be clear that [the Fourteenth Amendment] creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen[.]

Id. at 1836. During these debates, at no point did a member of Congress state or declare that the 1866 Civil Rights Act or the Fourteenth Amendment altered congressional plenary authority over the rules of citizenship, immigration, naturalization or foreign

affairs. In fact, the debates prove that such plenary authority remained, for Congress saw such power as a "duty to facilitate the belonging of people in [the] community." Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015, 1029 (2008).

Even the first sentence of Section 1 was merely declaratory of the ancient doctrine of allegiance. Charles, *Representation Without Documentation?*, *supra*, at 29-30. Section 1 reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. Amend. XIV, § 1. The debates of this section show that "subject to the jurisdiction thereof" was meant to address the doctrine of allegiance. Charles, *Representation Without Documentation?*, *supra*, at 29-30.

The drafters emphasized that the legal tenets of the doctrine of allegiance was still the key to United States citizenship in the late nineteenth century,[11] for what would become Section 1 originally read: "All persons born in the United States, and not subject to

[11] *See generally*, William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Zietlow, *supra*, at 1030 (citizenship "implies a requirement of allegiance in exchange for protection . . . because allegiance is a prerequisite for membership"); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 34-43 (2008) (discussing the allegiance for protection doctrine).

any foreign Power . . . are . . . citizens of the United States." 39 CONG. GLOBE 542 (1866). Senator Justin Morrill stated that this clause confirms the "grand principle both of nature and nations, both of law and politics, that birth gives citizenship of itself." *Id.* at 570. Senator Trumbull agreed and elaborated on the clause in the paradigm of the well-established doctrine of allegiance. Trumbull stated, "My own opinion is that all . . . persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress." *Id.* at 527. He would even later state that this language "make[s] citizens of everybody born in the United States who owe allegiance to the United States." *Id.* at 572; *see also id.* at 1756 ("the prevailing opinion" is that "all native-born persons not subject to a foreign Power are by virtue of their birth citizens of the United States").

Representative Burton Cook stated it "provides that all persons born within the United States, excepting those who do not owe allegiance to the United States Government" are citizens. *Id.* at 1124. Representative Wilson agreed, stating that the language was "merely declaratory of what the law now is." *Id.* at 1115. Discussing the law of nations, Blackstone, and American jurisprudence, Wilson elaborated:

> We must depend on the general law relating to subjects and citizens recognized by all nations for a definition, and that must lead us to the conclusion that every person born in the United States is a natural-born citizen

> . . . except . . . children born on our soil to *temporary sojourners* or representatives of foreign governments[.]

Id. at 1117. The phrase "subject to any foreign Power" was later substituted by Senator Jacob Howard to read "subject to the jurisdiction thereof" in order to remove "all doubt as to what person are or are not citizens of the United States." *Id.* at 2890. Naturally, the substitution sparked debate, including the issue of whether such language would affect congressional power to define who is "subject to the jurisdiction" through the doctrine of allegiance. *Id.* at 2890-97. Senator R. Doolittle made such a query stating that he thought it was "exceedingly unwise" to adopt the "broad language proposed." *Id.* at 2893. However, Senator Trumbull calmed Doolittle and the other members' fears by confirming that the doctrine of allegiance was still applicable in defining United States citizenship. Trumbull stated that "subject to the jurisdiction thereof" meant "Not owing allegiance to anybody else." *Id.* Trumbull elaborated:

> Now, all this amendment provides is, that all persons born in the United States and not subject to some foreign Power . . . shall be considered as citizens of the United States. That would seem to not only be a wise but a necessary provision . . . I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.

Id. What Senator Trumbull and the other members were articulating is that Congress had the power to define which classes are "subject to the authority of the United States" or "subject to the jurisdiction thereof" through the doctrine of allegiance and its plenary authority over citizenship, immigration, naturalization, and foreign affairs.

Amici ACLU asserts that the statutes effecting citizenship at birth should be subjected to a heightened scrutiny. Br. Of Amici Curiae ACLU at 8-18. In making this assertion *Amici* ACLU claim that citizenship by statute is subject to the Equal Protection Clause, that the Plenary Power Doctrine does not touch upon citizenship by birth, and even if the Plenary Power Doctrine did touch upon citizenship by birth that "heightened scrutiny is nonetheless the applicable standard" because citizenship by birth is distinct from the other Plenary Power Doctrine areas of law — immigration, naturalization, and foreign affairs. *Id.* at 9, 11-14. However, *Amici* ACLU fail to provide any empirical evidence to support these claims other than a selective reading of this Court's precedent.

As discussed above, the legal and historical evidence cuts strongly against Petitioners and *Amici* ACLU. Furthermore, this Court held in *Wong Kim Ark* that Senator Trumbull and the Reconstruction Congress did not view Section 1 of the Fourteenth Amendment as impacting congressional plenary power over citizenship, or its intimate relation to immigration, naturalization, and foreign affairs. In

particular the Court held that the change in Fourteenth Amendment text from "subject to any foreign Power" to "subject to the jurisdiction thereof" was "affirmative of existing law[.]" *Wong Kim Ark*, 169 U.S. at 688.

The Fourteenth Amendment's constitutional rule for citizenship at birth is not a broad command, but a reaffirmation of the Founding Fathers' principles. First, the Fourteenth Amendment conditions citizenship to persons that are born in the territorial United States. U.S. CONST. Amend. XIV, § 1. Second, outside of children born of persons who are subject to the "complete jurisdiction" of the United States, the Fourteenth Amendment permits Congress to adopt statutes prescribing who is "subject to the jurisdiction thereof" through the doctrine of allegiance, and congressional plenary power over citizenship, naturalization, immigration, and foreign affairs. Charles, *Representation Without Documentation?*, *supra*, at 29-32; U.S. CONST. Amend. XIV, § 5.

CONCLUSION

Based on the foregoing legal and historical support for the Court's long standing Plenary Power Doctrine concerning citizenship, we ask that the Court uphold the decision of the Ninth Circuit.

Respectfully submitted,

MICHAEL M. HETHMON*
IMMIGRATION REFORM
. LAW INSTITUTE
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
Attorney for the Amicus Curiae
**Counsel of Record*

AMICUS CURIAE BRIEF

No. 09-5801

Supreme Court, U.S.
JUN 25 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RUBEN FLORES-VILLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
(312) 660-1613

DEBORAH S. SMITH
STEPHEN W. MANNING
AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Suite 300
Washington, DC 20005
(202) 507-7600

June 25, 2010

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Dr.,
Suite 3500
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

D. THEODORE RAVE
JONES DAY
222 East 41st St.
New York, NY 10017
(212) 326-3939

Counsel for Amici Curiae

938 42

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. THE COURT CAN REMEDY THE CONSTITUTIONAL VIOLATION 7

A. Extension Of Benefits Is The Normal Remedy For An Equal Protection Violation 7

B. Congress Would Prefer The Extension, Rather Than Nullification, Of The More Lenient Residency Requirements Of § 1409(c) 10

1. All Objective Indications Suggest That Congress Would Prefer Extension To Nullification 10

2. Neither This Court's Cases Dealing With Naturalization, Nor This Court's Deference To Congress In Immigration Matters, Requires A Different Result 15

II. FLORES-VILLAR HAS STANDING TO CHALLENGE THE CITIZENSHIP STATUTE ON EQUAL PROTECTION GROUNDS 25

A. Flores-Villar Has First-Party Standing Because He Is Asserting His Own Rights 25

B. Flores-Villar Also Has Third-Party Standing To Assert His Father's Rights 26

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Bindczyck v. Finucane,
342 U.S. 76 (1951) 21

Bolling v. Sharpe,
347 U.S. 497 (1954) 7

Califano v. Goldfarb,
430 U.S. 199 (1977) 11

Califano v. Westcott,
443 U.S. 76 (1979) ..... *passim*

Campbell v. Louisiana,
523 U.S. 392 (1998) ..... *passim*

Carey v. Population Servs., Int'l,
431 U.S. 678 (1977) 30

Cox v. Schweiker,
684 F.2d 310 (5th Cir. 1980) 9

Craig v. Boren,
429 U.S. 190 (1976) ..... *passim*

Crist v. Pinkerton,
632 F.2d 1226 (5th Cir. 1980) 9

Dep't of Labor v. Triplett,
494 U.S. 715 (1990) 30

Eisenstadt v. Baird,
405 U.S. 438 (1972) ..... *passim*

Fedorenko v. United States,
449 U.S. 490 (1981) 6

Fiallo v. Bell,
430 U.S. 787 (1977) 20, 21

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 25

Frontiero v. Richardson,
411 U.S. 677 (1973) (plurality op.) 9

Gladstone, Realtors v. Vill. of Bellwood,
441 U.S. 91 (1979) 32

Griswold v. Connecticut,
381 U.S. 479 (1965) 29, 30

Heckler v. Mathews,
465 U.S. 728 (1984) ..... *passim*

Hollander v. McCain,
566 F. Supp. 2d 63 (D.N.H. 2008) 18

INS v. Chadha,
462 U.S. 919 (1983) 13, 21, 22, 23

INS v. Pangilinan,
486 U.S. 875 (1988) 20, 21

Jiminez v. Weinberger,
417 U.S. 628 (1974) 9

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 5

Kleindienst v. Mandel,
408 U.S. 753 (1972) 21

Loving v. Virginia,
388 U.S. 1 (1967) 24

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 2, 22

McCulloch v. Maryland,
4 Wheat. 316 (1819) 21

Miller v. Albright,
523 U.S. 420 (1998) ..... *passim*

Minor v. Happersett,
88 U.S. 162 (1874) 17

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) 8

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 30

Nemetz v. INS,
647 F.2d 432 (4th Cir. 1981) 21

Nevada Dep't. of Human Res. v. Hibbs,
538 U.S. 721 (2003) 23

Ortega v. Holder,
592 F.3d 738 (7th Cir. 2010) 31, 32, 33

Planned Parenthood of Cent. Missouri v. Danforth,
428 U.S. 52 (1976) 26

Powers v. Ohio,
499 U.S. 400 (1991) ..... *passim*

Rios-Valenzuela v. Dep't of Homeland Sec.,
506 F.3d 393 (5th Cir. 2007) 31

Robinson v. Bowen,
No. C 08-03836 WHA, 2008 U.S. Dist. Lexis
82306 (N.D. Cal. Sept. 16, 2008) 18

Schneider v. Rusk,
377 U.S. 163 (1964) 16

Secretary of State v. J.H. Munson Co.,
467 U.S. 947 (1984) 26

Singleton v. Wulff,
428 U.S. 106 (1976) 32

Strauder v. West Virginia,
100 U.S. 303 (1879), *abrogated on other grounds by Taylor v. Louisana*,
419 U.S. 522 (1975) 26, 30

Soto-Lopez v. New York City Civil Serv. Comm'n,
755 F.2d 266 (2d Cir. 1985) 9

Tuan Anh Nguyen v. INS,
533 U.S. 53 (2001) ..... *passim*

United States v. Cervantes-Nava,
281 F.3d 501 (5th Cir. 2002) 23, 24

United States v. Flores-Villar,
536 F.3d 990 (9th Cir. 2008) 13

United States v. Salerno,
481 U.S. 739 (1987) 23

United States v. Virginia,
518 U.S. 515 (1996) 8

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 16, 21

Wauchope v. Dep't of State,
985 F.2d 1407 (9th Cir. 1993) 9, 20

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 9

Welsh v. United States,
398 U.S. 333 (1970) ..... *passim*

CONSTITUTIONAL AUTHORITIES

U.S. Const. Art. I, § 8, cl. 4 ..... 17, 21

U.S. Const. Art. VI 22

STATUTES

48 Stat. 797 19

65 Stat. 88 ..... 11, 12

8 U.S.C. § 1101 12
8 U.S.C. § 1101(a)(23) 16
8 U.S.C. § 1151(b)(2)(A)(i) 15
8 U.S.C. § 1182(a)(9)(B)(v) 15
8 U.S.C. § 1182 (h)(2) 15
8 U.S.C. § 1229b(b)(2) 15
8 U.S.C. § 1252 31
8 U.S.C. § 1256 15
8 U.S.C. § 1326 24
8 U.S.C. § 1401 ..... *passim*
8 U.S.C. § 1401(g) 2
8 U.S.C. § 1409 ..... *passim*
8 U.S.C. § 1409(c) ..... *passim*
8 U.S.C. § 1421(d) 4, 16, 18
8 U.S.C. § 1430(a) 15
8 U.S.C. § 1451(d) 15
8 U.S.C. § 1451(e) 15
8 U.S.C. § 1503(a) 31, 33
42 U.S.C. § 402 (1976 ed., Supp. V) 12
42 U.S.C. § 1303 ..... 11, 12
Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155 18
Act of Feb. 10, 1855, § 1, 10 Stat. 604 18
Act of Jan. 29, 1795, § 3, 1 Stat. 414, 415 18
Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 17
Act of May 24, 1934 18
Immigration and Nationality Act of 1952
§§ 301(a)(7), (b), 66 Stat. 235, 236 18

Nationality Act of 1940, § 201(g), 54 Stat. 1137, 1139 19

OTHER AUTHORITIES

1 William Blackstone, Commentaries on the Laws of England 23 6

Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L. J. 881 (1988) 18

Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000) 24, 26

S. Rep. No. 81-1515 (1950) 13

S. Rep. No. 82-1137 (1952) 13

INTEREST OF *AMICI CURIAE* [1]

The National Immigrant Justice Center (NIJC) and the American Immigration Lawyers Association (AILA) are two immigration-focused organizations with substantial interest in this Court's resolution of this case.

NIJC is a non-profit organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2009, NIJC provided such legal services to more than 10,000 non-citizens. NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through advocacy for policy reform, impact litigation, and public education.

AILA is a national association with over 12,000 members throughout the United States, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws;

---

[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

While this case comes to this Court in a criminal posture, it implicates fundamental questions about the ability of the federal courts to do justice in cases where United States citizenship laws are alleged to have been drawn in an unconstitutionally discriminatory manner. As two preeminent organizations in the immigration litigation field, NIJC and AILA share a unique perspective on these fundamental questions. Simply put, in the tradition dating back at least to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), constitutional rights must have remedies in the immigration context just as in any other context. Accordingly, if the Court finds that the derivative citizenship provisions of the Immigration and Naturalization Act (INA) at issue here violate the Equal Protection guarantee, it surely has the power to remedy the unconstitutionally discriminatory citizenship scheme for children born outside of the United States to unwed United States citizen parents.

SUMMARY OF THE ARGUMENT

Between 1952 and 1986, 8 U.S.C. § 1401(g) established a default rule for children born outside the United States to parents, one of whom was a United States citizen. For the child to be considered a United States citizen "at birth," the United States citizen parent had to have been physically present in the United States for at least 10 years, 5 of which had to be after attaining the age of 14. For children born out of wedlock, § 1409(c) modified that default rule based on the gender of the parent. An unwed

mother (but not an unwed father) could pass citizenship if she had continually resided in the United States for one year at any time before the birth of the child. Petitioner Ruben Flores-Villar, who was born outside the United States out of wedlock to a United States citizen father and an alien mother, challenges that distinction as unconstitutional.

NIJC and AILA submit this brief *amici curiae* to assuage any concerns the Court might have about its ability to do justice when a portion of a nationality statute is unconstitutional. In particular, while in prior cases questions have been raised about the competence of the federal courts to fashion a remedy for a person like Flores-Villar, and his standing to seek such a remedy, neither of these considerations should pose an obstacle here should the Court find a constitutional violation.

1. It is by now well-accepted that where a statute is unconstitutional because of underinclusion a court may either declare it a nullity or may extend its coverage to those aggrieved by exclusion. Unless Congress has manifested a contrary preference, the ordinary preference is for extension, even if it requires construing gender-based terms in a gender-neutral manner.

Here, all indications are that Congress would prefer the extension of the benefit in § 1409(c) to its nullification. The determination turns on the intensity of Congress's commitment to the residual policy embodied in the provision and the degree of potential disruption of the statutory scheme that would occur with extension as opposed to abrogation. Here, the presence of a broad severability clause suggests a broad discretion in the courts to perform

the remedial operation of extension. Extension is also more consistent with the Government's asserted justification for the gender-based classification in § 1409(c), preventing statelessness. And extending the benefit also minimizes the chances of upsetting the vested interests and settled expectations of individuals who are already citizens under § 1409(c), whose citizenship would be called into question if the Court were to choose nullification over extension, as well as any relatives who relied on that citizenship to themselves pursue various forms of immigration-related relief.

Nor are there any meaningful contrary indications. Because these statutes deal with "at birth" citizenship rather than naturalization, 8 U.S.C. § 1421(d)'s prescription against naturalization other than as provided for by the INA has no application here. Any statutory references to naturalization only concern the granting of citizenship after birth. While the Fourteenth Amendment makes all children born in the United States citizens at birth, it does not change Congress's power to create other kinds of "at-birth" citizens. And Congress has consistently understood the question of the citizenship of a child of a United States citizen born outside the United States to be an issue of at birth citizenship rather than naturalization. That is why extending the § 1409(c) benefit as remedy for its drawing unconstitutional sex-based lines does not run afoul of this Court's jurisprudence holding that courts lack the power to confer citizenship. This is not a case of conferring citizenship after birth as a remedy for a statutory violation. It is a case of remedying an unconstitutional withholding of at birth citizenship. To conclude that Congress preferred extension of the benefit to nullification is to obviate, in the case of a

constitutionally flawed grant of at birth citizenship, any objection to judicial competence to right the wrong.

2. Flores-Villar also has standing to pursue the remedy he seeks. It is beyond cavil that, having been convicted of a crime of which alienage is an element based solely on the sex-based distinction § 1409(c) draws, he has suffered an injury in fact. That injury is fairly traceable to the challenged action and, as set out above, is redressable by a favorable decision.

Flores-Villar also has third-party standing as a prudential matter to assert his father's Equal Protection rights. Again, Flores-Villar has suffered an injury in fact. He certainly shares a close relationship with his father, his biological parent with whom he lived from the age of 2 months into adulthood. And his father is hindered in vindicating his own rights, not just by the fact that this case arises as a criminal proceeding against Flores-Villar, but indeed, in that the entire set of procedures Congress has established for the review of contested citizenship questions demonstrates a clear preference against the resolution of such questions by means of a collateral attack. And besides, privacy concerns clearly chill a father from independently litigating these issues given the attention it would draw to his child.

In sum, Flores-Villar is easily the least awkward challenger to the sex-based classification drawn by § 1409(c). And, should the Court find a constitutional violation, it should remedy that violation by extending citizenship to Flores-Villar.

ARGUMENT

Citizenship, as this Court has recognized, is "a most precious right." *Kennedy v. Mendoza-Martinez*,

372 U.S. 144, 159 (1963); *see also Fedorenko v. United States*, 449 U.S. 490, 507 (1981) (citizenship is a "priceless treasure") (quotation marks omitted). While Congress certainly has the power to determine in the first instance who shall be deemed a citizen "at birth" (besides those persons born in the United States, who are automatically citizens by virtue of section 1 of the Fourteenth Amendment), it cannot bestow the right of citizenship in ways that violate other specific constitutional guarantees. Where Congress does that, in the immigration context as elsewhere, courts must have the power to set matters right. To admit otherwise would be to disavow the central tenet, which traces back to before the founding, "that every right when with-held must have a remedy, and every injury it's [sic] proper redress." 1 William Blackstone, Commentaries on the Laws of England 23.

In § 1409 citizenship cases before this Court, two kinds of threshold questions have interested various of its members. The first is a remedy question: whether, even if a petitioner can prove a constitutional violation, the Court is without power to redress the injury because only Congress can confer citizenship. The second is a standing question: whether a child petitioner lacks standing to vindicate citizenship wrongly denied him where statutory grants of citizenship at birth are dependent upon the status of the parent rather than the child.

Neither of these purported obstacles, however, prevents the Court in this case from reaching the constitutionality of the gender-based classification in 8 U.S.C. § 1409(c), or from affording Flores-Villar a remedy if it finds that the statute violates the Constitution's Equal Protection guarantee. When the

relevant statutory scheme and precedents are properly understood, Flores-Villar has standing to challenge the statute's gender-based classification. And this Court can remedy the Equal Protection violation in the same manner that it has traditionally addressed such inequities: by extending the benefit distributed discriminatorily—in this case, citizenship—to the disfavored class.

I. THE COURT CAN REMEDY THE CONSTITUTIONAL VIOLATION.

If the Court determines that the gender-based classification in § 1409 violates the Equal Protection component of the Fifth Amendment's Due Process Clause, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), the Court has the power to construe that provision to apply in a gender-neutral way. Whatever the appropriate deference owed to Congress in naturalization matters, it does not limit the Court's ability to extend the benefit of "at birth" citizenship equally to foreign-born children of both unwed citizen fathers and unwed citizen mothers—and thus, to hold that Flores-Villar is a citizen.

A. Extension Of Benefits Is The Normal Remedy For An Equal Protection Violation.

"Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring in result); *see also Heckler v. Mathews*, 465 U.S. 728, 738 & 739

n.5 (1984); *Califano v. Westcott*, 443 U.S. 76, 89 (1979).[2] So, if the Court concludes that the gender-based classification in § 1409 violates the Equal Protection guarantee, it can either (1) nullify § 1409(c) and withdraw the benefit from children born abroad to unwed citizen mothers, or (2) extend § 1409(c) to apply to both men and women, thereby extending the benefit to children born abroad to unwed citizen fathers.

Ordinarily, unless the Court believes that Congress would prefer otherwise, "extension, rather than nullification, is the proper course" for Equal Protection violations. *Westcott*, 443 U.S. at 89; *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (extending benefit of admission to military academy to women to remedy Equal Protection violation); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (extending admission to nursing school to men); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)

---

[2] Welsh, like Flores-Villar, was not the plaintiff in declaratory judgment action, but the target of a criminal prosecution. He was convicted of violating a draft statute that drew an impermissible distinction between religious and nonreligious beliefs in its conscientious objector exemption. 398 U.S. at 362. As Justice Harlan noted, at the very least, the Constitution mandated that his conviction be reversed. *Id.* ("Since [the exemption] created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless."). But Justice Harlan further explained that, even if Welsh had brought an action for a declaratory judgment, he would have found it appropriate to extend the statutory benefit to the disfavored class, even though it was "more analogous to a graft than amputation." *Id.* at 363-64.

(extending Social Security benefits to remedy Equal Protection violation); *Jiminez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (same); *Frontiero v. Richardson*, 411 U.S. 677, 691 & n.25 (1973) (plurality op.) (same); *Wauchope v. Dep't of State*, 985 F.2d 1407, 1416-17 (9th Cir. 1993) (holding pre-1934 version of INA violates Equal Protection and extending citizenship to foreign-born children of citizen mothers as well as citizen fathers); *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266 (2d Cir. 1985) (extending benefits afforded to in-state veterans to non-resident veterans); *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1980) (extending right to inherit from intestate father to both legitimate and illegitimate children); *Crist v. Pinkerton*, 632 F.2d 1226 (5th Cir. 1980) (extending benefit of non-dischargeability of alimony debts in bankruptcy to husbands as well as wives).

This presumption in favor of extending the benefit to the disfavored class applies even if it requires construing gender-based terms in a gender-neutral manner. Thus, in *Califano v. Westcott*, the Court held that the provision of the Aid to Families with Dependent Children statute authorizing assistance to children of unemployed fathers, but not unemployed mothers, violated the Equal Protection guarantee. 443 U.S. at 85-89. To remedy the constitutional violation, the Court ordered that the term "'father' be replaced by its gender-neutral equivalent" in the statute such that "benefits simply will be paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father." *Id.* at 92; *see also Welsh*, 398 U.S. at 363-64 (Harlan, J., concurring) (proper remedy was to extend draft exemption to cover non-religious conscientious objectors specifically excluded by statutory language

even though it was "tantamount to extending the statute" and "more analogous to a graft than amputation"). This type of statutory construction is done not as a matter of constitutional avoidance, but as a constitutional remedy. *See Welsh*, 398 U.S. at 345, 355, 366-67 (Harlan, J., concurring).

B. Congress Would Prefer The Extension, Rather Than Nullification, Of The More Lenient Residency Requirements Of § 1409(c).

In determining which remedial option to choose (extension or nullification), the Court must look to the "intent of the legislature," and should therefore "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Mathews*, 465 U.S. at 739 n.5 (quoting *Welsh*, 398 U.S. at 365 (Harlan, J., concurring)). Here, extension of the more lenient residency requirements for unmarried citizen mothers and their foreign-born children in § 1409(c) to unmarried citizen parents of both genders comports more closely with the legislative purposes underlying the citizenship provisions of the INA than would withdrawal of the benefit from unwed mothers.

1. All Objective Indications Suggest That Congress Would Prefer Extension To Nullification.

a. The presence of a severability clause can be an important indicator of congressional intent. As Justice Harlan explained in *Welsh* the presence of a "broad severability clause" in the statute was indicative of a legislative intent that the long-standing policy underlying the statute be salvaged, and it conferred on the Court "broad discretion" to

perform the "remedial operation" of extension to effect "the necessary statutory repairs." 398 U.S. at 364-66. And in *Califano v. Westcott*, the Court held that the "presence in the Social Security Act of a strong severability clause . . . likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." 443 U.S. at 90.[3]

By contrast, in *Heckler v. Mathews*, the Court found a very specific severability clause indicative of Congress's "preference for nullification, rather than extension," of the benefit in the case of constitutional infirmity. 465 U.S. at 739 n.5. Congress had inserted the severability clause considered in Mathews into the particular subsection of the Social Security Act temporarily exempting spousal benefits paid to wives, but not husbands, from a pension offset, which was aimed at protecting the reliance interests of women who had planned their retirements under the pre-1977 law this Court held invalid in *Califano v. Goldfarb*, 430 U.S. 199 (1977). *See Mathews*, 465 U.S.

---

[3] The severability clause in the statute at issue in *Welsh* provided: "If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby." 65 Stat. 88; *see Welsh*, 398 U.S. at 364 (Harlan, J., concurring).

Similarly, the severability clause at issue in *Westcott* provided: "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U.S.C. § 1303; *see Westcott*, 443 U.S. at 90 n.8.

at 731-34. Manifesting a clear intent to "avoid th[e] fiscal drain" that would accompany extension of the benefit, id. at 732, the severability clause provided that if any provision of the subsection containing the temporary gender-based exception was held invalid, "the application of *this subsection* to any other persons or circumstances *shall also be considered invalid*." *Id.* at 734 (quoting 1977 Amendments, § 334(g)(3), note following 42 U.S.C. § 402 (1976 ed., Supp. V)) (emphases added). Thus the Court had no trouble concluding that Congress had "clearly expressed its preference for nullification, rather than extension, of the pension offset exception in the event it is found invalid." *Id.* at 739 n.5. But the Court did not actually have to make the choice between extension and nullification in *Mathews* because it found no Equal Protection violation. *Id.* at 749-50.

The INA contains a severability clause nearly identical to those considered in *Westcott* and *Welsh*:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances, shall not be affected thereby.

INA § 406, 66 Stat. 281; *see* note following 8 U.S.C. § 1101 "Separability"; *compare* 42 U.S.C. § 1303 (discussed in *Westcott*, 443 U.S. at 90 & n.8) *and* 65 Stat. 88 (discussed in *Welsh*, 398 U.S. at 364 (Harlan,

J., concurring)).[4] The broad severability clause in the INA, which the Court has described as "unambiguous," *INS v. Chadha*, 462 U.S. 919, 932 (1983), stands in stark contrast to the one considered in *Mathews*, which made abundantly clear Congress's intent that the benefit be withdrawn in the case of constitutional infirmity. As in *Westcott* and *Welsh*, the presence of a broad severability clause evidences a congressional intent that the policy underlying the INA be given effect even if "particular provisions" are constitutionally invalid.

b. Extension of the benefit is also more consistent with the Government's asserted justification for the gender-based classification—preventing statelessness. *United States v. Flores-Villar*, 536 F.3d 990, 996 (9th Cir. 2008); *see also* Revision of Immigration and Nationality Laws, S. Rep. No. 82-1137, at 39 (1952) ("This provision [§ 1409(c)] establishing the child's nationality as that of the mother regardless of legitimation or establishment of paternity . . . insures that the child shall have a nationality at birth."). Indeed, extending § 1409(c) to unwed parents of both genders would go further toward preventing statelessness than even the current discriminatory statutory scheme. Some countries that follow the *jus sanguinis* rule assign the father's nationality to a child born out of wedlock rather than the mother's; extension would protect children born in those countries. Cert. Reply at 9-10 & n.4. If, on the other hand, the Court were to nullify the benefit extended

---

[4] The INA's severability clause is described in the legislative history as "the usual separability clause." Immigration and Naturalization Systems of the United States, S. Rep No. 81-1515, at 810 (1950).

to children of unwed citizen mothers in § 1409(c)—by, for example, subjecting unwed mothers to the same lengthy residency requirements as unwed fathers or eliminating *jus sanguinis* United States citizenship for illegitimate children entirely—the Court would exacerbate the risk that children would be born stateless. Nullification of § 1409(c) would increase the risk that children born abroad to unwed United States-citizen mothers could acquire citizenship only in the country of birth (if it follows jus solis) or in the country of the father's nationality (if it recognizes such *jus sanguinis* transmission to illegitimate children). Such a regime would leave many more children stateless, and even those who acquire some citizenship at birth may become citizens of a country with which neither parent—let alone the child—has any meaningful contacts.

c. Finally, extending the § 1409(c) benefit also minimizes the chances of upsetting the vested interests and settled expectations of parties not represented in this litigation, which nullifying the more lenient provision for unwed citizen mothers could clearly bring about. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting). Nullification of § 1409(c) would create an entire class of persons who were considered citizens their entire lives, but were suddenly stripped of citizenship because their mothers did not meet the more stringent residency requirements of § 1401 before they were born.

This would, in turn, have ripple effects affecting an even larger class of individuals related to those persons by marriage or birth. United States citizens may file visa petitions for spouses, siblings, and children, allowing them to immigrate to this country.

8 U.S.C. § 1151(b)(2)(A)(i). Living in marital union with a United States citizen shortens the residency requirement for naturalization from 5 to 3 years. 8 U.S.C. § 1430(a). And hardship to United States citizens is considered for various forms of relief. *See* 8 U.S.C. §§ 1229b(b)(2); 1182(a)(9)(B)(v); 1182(h)(2). If the Court struck § 1409(c) in its entirety, it would not only strip citizenship from persons directly covered by § 1409(c), but would upend the cases of their family members, making them retroactively ineligible for permanent residency or naturalization. That could render these individuals subject to denaturalization, 8 U.S.C. § 1451(d), (e), or rescission of permanent resident status, 8 U.S.C. § 1256, which could cause a new set of ripples.

The Court should not presume that Congress intended such a drastic and inequitable result when the more typical and less disruptive remedy of extension is available.[5]

2. Neither This Court's Cases Dealing With Naturalization, Nor This Court's Deference To Congress In Immigration Matters, Requires A Different Result.

In contrast, nothing in the statute suggests that Congress would prefer eliminating the preferential

---

[5] "Congress, of course, remains free to redesign the statute in a manner that comports with the Constitution," if the Court turns out to be wrong in assuming its preference for extending the benefit of § 1409(c). *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). And, in doing so, Congress can account for the settled expectations of persons who relied on the discriminatory benefits conferred by § 1409(c), whose interests are not represented in the instant litigation. *Cf. Mathews*, 465 U.S. at 750-51.

benefit afforded to children of unwed citizen mothers to extending it to children of unwed citizen fathers.

a. Because this case does not involve "naturalization," no contrary congressional intent is demonstrated by 8 U.S.C. § 1421(d), which states that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." Section 1421(d) applies only to "naturalization," which the INA defines as "the conferring of nationality of a state upon a person *after birth*, by any means whatsoever." 8 U.S.C. § 1101(a)(23) (defining "naturalization" "[a]s used in this chapter," of which chapter § 1421 is a part) (emphasis added). Sections 1401 and 1409, on the other hand, deal with the acquisition of citizenship *at birth*. "Congress does not believe that this kind of citizenship involves 'naturalization.'" *Miller v. Albright*, 523 U.S. 420, 480 (1998) (Breyer, J., dissenting); *see also id.* at 432 (opinion of Stevens, J.) ("[J]udgment in [petitioner's] favor would confirm her pre-existing citizenship rather than grant her rights she does not now possess."); *Nguyen*, 533 U.S. at 95 (O'Connor, J., dissenting).[6]

---

[6] Whether it might be "naturalization" for constitutional purposes is irrelevant. *Compare United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898), *with Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964) (Unlike "naturalization," "acquisition of citizenship by being born abroad of an American parent" is "not covered by the Fourteenth Amendment" but is instead "left to proper Congressional action"). What matters here is whether Congress understood this to be "naturalization" as defined in the INA. The plain text precludes any reading of § 1421(d) which would constrain the Court in this case.

Moreover, the majority's dictum in *Nguyen*, 533 U.S. at 72, notwithstanding, this interpretation of § 1421(d) is correct as a matter of law. While Congress draws both its power to naturalize aliens and its power to treat children born abroad as citizens at birth from the Naturalization Clause, U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have the Power . . . To establish an uniform Rule of Naturalization"), beginning with the First Congress, it has always treated the naturalization of aliens, on one hand, and citizenship acquired at birth, on the other, as distinct concepts as a statutory matter. The first naturalization statute, passed in 1790, set forth requirements—including residency and character requirements—for the naturalization of aliens. But it explicitly provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, *shall be considered as natural born citizens*." Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (emphasis added); *see also Minor v. Happersett*, 88 U.S. 162, 167-68 (1874) (noting that the framers of the Constitution and the First Congress were familiar with the common-law meaning of "natural born citizen" as "distinguished from aliens or foreigners"). [7] Congress has maintained that conceptual distinction throughout

---

[7] By contrast, that Act provided that "the children of [a naturalized] person . . . dwelling within the United States and being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 103. Because citizenship in such cases was granted after birth, not at birth, children who automatically became citizens upon the naturalization of their parents were not treated as "natural born citizens" but as naturalized citizens.

the subsequent amendments to the immigration and naturalization laws. *See* Act of Jan. 29, 1795, § 3, 1 Stat. 414, 415; Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155; Act of Feb. 10, 1855, § 1, 10 Stat. 604; Rev. Stat. § 1993, § 1, 48 Stat. 797; Nationality Act of 1940, § 201(g), 54 Stat. 1137, 1139; Immigration and Nationality Act of 1952 §§ 301(a)(7), (b), 66 Stat. 235, 236 (codified as amended, 8 U.S.C. § 1401). *See generally Miller*, 523 U.S. at 477 (Breyer, J., dissenting).

Indeed, even though the words "natural born" were dropped from the 1934 version of the statute, Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797, Senator John McCain—who was born in 1936 to American parents in the Panama Canal Zone—was eligible to run for president in 2008 as a "natural born citizen." *Robinson v. Bowen*, No. C 08-03836 WHA, 2008 U.S. Dist. Lexis 82306 (N.D. Cal. Sept. 16, 2008); *see also Hollander v. McCain*, 566 F. Supp. 2d 63, 65-66 (D.N.H. 2008). Likewise, Franklin D. Roosevelt served four terms as President of the United States despite the fact that he was born in Canada to United States citizen parents. Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L. J. 881, 882 n.6 (1988). Under Article II, section 1 of the Constitution, neither would have been eligible for the Presidency if he had become a citizen through "naturalization."

Thus, § 1421(d) does not evidence a congressional intent to nullify, rather than extend, the benefits conferred by § 1409(c) as a remedy for an Equal Protection violation. Nor does it limit the INA's broad severability provision. And, perhaps most

importantly, it does not ameliorate the substantial disruption faced by those living as United States citizens whose rights would be affected by the nullification of the more lenient residency requirements for unwed mothers.

b. Relatedly, while some members of the Court have voiced concerns about the Court's ability to "confer citizenship in violation of statutory limitations," *Miller*, 523 U.S. at 456 (Scalia, J., concurring) (quoting *INS v. Pangilinan*, 486 U.S. 875, 885 (1988) (brackets omitted), those concerns do not prevent the Court from affording a constitutional remedy to Flores-Villar here.[8] In *INS v. Pangilinan*, the Court held that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-84. Thus the Court held that it lacked the equitable power to cure a *statutory* violation—the government's failure to provide a naturalization officer in the Philippines despite the requirements of the naturalization statute—by conferring citizenship in the face of explicit congressional intent not to extend citizenship to aliens who did not satisfy the statutory criteria. *Id.* at 884-85. *Pangilinan* did not, however, say that the Court lacked the power to review and remedy a

---

[8] Justice Scalia's position was rejected by a majority of the Justices in *Miller*. *See* 523 U.S. at 423 (opinion of Stevens, J., joined by Rehnquist, C.J.); *id.* at 460 (Ginsburg, J., dissenting, joined by Souter and Breyer, JJ.); *id.* at 471 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.); *see also Nguyen*, 533 U.S. at 73-74 (Scalia, J., concurring) (recognizing this fact and joining the majority on the merits).

constitutional violation in an "at birth" citizenship statute.[9]

That makes this case distinguishable for two reasons. *First*, the deference this Court has frequently shown Congress in immigration matters stems from the "sovereign" nature of the political branches' "power to expel or exclude aliens." *Fiallo v. Bell*, 430 U.S. 787, 792, 795 n.6 (1977). Thus, the Court has noted, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* at 792 (quotation marks omitted). In *Fiallo*, the Court rejected a challenge to a statutory scheme that afforded a "special preference immigration status" to certain aliens based on their relationships with United States citizens or lawful permanent residents. (The statute recognized the relationship between a natural mother and her illegitimate child, but not the relationship between a natural father and his illegitimate child.) In deferring to Congress's choice not to accord preferential status to a particular class of aliens, the Court acknowledged that such a rule "would be unacceptable if applied to citizens." *Id.* (quotation marks omitted).

But this case, by contrast, is not about the admission or exclusion of aliens. It concerns the logically antecedent question of who is an alien and who is a citizen. *See Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). The issue here is whether

---

[9] Indeed, after holding that it was powerless to afford a remedy for the statutory violation, the Court in *Pangilinan* went on to consider the plaintiffs' constitutional claims on the merits. *Id.* at 875-76; *see also Wauchope*, 985 F.2d at 1418.

Flores-Villar was a citizen "at birth." *See Miller*, 523 U.S. at 432 (opinion of Stevens, J.) ("[U]nlike the petitioners in *Fiallo* . . . , [i]f [the petitioner here] were to prevail, the judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess."). Thus the deference the Court shows Congress in its sovereign capacity to regulate the admission or exclusion of aliens does not impede the Court from remedying a constitutional violation in the statute defining who is a citizen "at birth."

Second, although Congress has broad power in matters of "immigration and naturalization," *Fiallo*, 430 U.S. at 792—a power this Court has sometimes described as "plenary," *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972)—that power is still limited by the Constitution. As the Court explained in INS v. Chadha: "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), *so long as the exercise of that authority does not offend some other constitutional restriction*." 462 U.S. at 941 (emphasis added). The deference owed to Congress in matters of immigration and naturalization does not permit Congress to enact—or this Court to enforce—unconstitutional legislation.[10] Thus there is

---

[10] If the Constitution truly imposes no limits on this authority, Congress could enact even a race-based limitation to the acquisition of citizenship at birth, *cf. e.g.*, *Wong Kim Ark*, 169 U.S. at 701-02 (noting no naturalization authority for Chinese natives of the "Mongolian race"), notwithstanding the constitutional call for a rule of naturalization which is "uniform." U.S. Const. art. I, § 8, cl. 4. *See generally, Bindczyck v. Finucane*, 342 U.S. 76 (1951); *Nemetz v. INS*, 647 F.2d 432, 435 (4th Cir. 1981).

no question that the Court may exercise judicial review of the constitutionality of immigration and naturalization legislation. *See id.* at 940-43.

Here, Flores-Villar does not ask the Court to exercise its equitable power to confer citizenship on him where the statute does not. He seeks a constitutional remedy—that the Court cure the statute of its constitutional defect so that it may operate to determine whether citizenship was transmitted to him at birth. *See Nguyen*, 533 U.S. at 95-96 (O'Connor, J., dissenting). In such a case, to conclude (under normal principles applicable for remedying unconstitutional statutes) that Congress would have preferred the extension of § 1409(c) to its nullification dispatches any concern that such an extension would usurp the prerogatives of the Legislature.

c. Finally, it is no answer to say that the objective indicators are just not clear enough, such that Flores-Villar must lose. The Court, faced with a constitutional violation squarely presented in a case properly before it, has an obligation to afford a remedy. *See Marbury*, 5 U.S. (1 Cranch) at 177-80. If the Court cannot conclude that Congress, in the exercise of its "plenary" power, would have preferred to extend or nullify the benefit in § 1409(c) with sufficient certainty to sever or cure the unconstitutional portions of the statute and leave the remainder intact, *cf. Miller*, 523 U.S. at 457 (Scalia, J., concurring), the Court still cannot permit Flores-Villar to be criminally prosecuted based on unconstitutionally discriminatory classifications.

Like any other statute, if the INA conflicts with the Constitution, it is no law at all. *See* U.S. Const. Art. VI; *Marbury*, 5 U.S. (1 Cranch) at 177 ("[A]n act

of the legislature, repugnant to the constitution, is void."); *Chadha*, 462 U.S. at 940-41 (while Congress has broad authority in immigration maters, the issue of "whether Congress has chosen a constitutionally permissible means of implementing that power" is subject to judicial review.) Accordingly, if the Court were unable to divine Congress's preference between "eliminat[ing] its policy altogether or extend[ing] it in order to render what Congress plainly did intend, constitutional," *Welsh*, 398 U.S. at 356 (Harlan, J., concurring)—and if it were to conclude that, despite the INA's severability clause, it lacked the power to "sever[] an unconstitutional restriction upon the grant of immigration or citizenship," *Miller*, 523 U.S. at 457 (Scalia, J., concurring)—then the proper course would not be to let the constitutional violation go unremedied, but rather to hold the statute to be unconstitutional as applied to persons like Flores-Villar, and thus to prevent its criminal application to him here. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Nevada Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) ("When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional as applied to him.") (emphasis in original). For the criminal provision under which Flores-Villar was convicted, as well as the citizenship provisions in §§ 1401 and 1409, are all part of the INA.[11] Notwithstanding the scope and complexity of

---

[11] The Fifth Circuit was mistaken in this regard in *United States v. Cervantes-Nava*, 281 F.3d 501, 504-06 (5th Cir. 2002). There, the Fifth Circuit posited that the two potential remedies if §§ 1401 and 1409 were unconstitutional were to (1) "sever the more lenient residency requirement for citizen mothers of

the INA, the Court should not apply an unconstitutional statute to a criminal defendant simply because it is difficult to discern which remedial option Congress would have preferred.[12]

(continued...)

illegitimate children" or (2) "strike down the INA in its entirety," and because neither alternative would grant Cervantes-Nava citizenship, the government would still have met its burden of proving alienage in order to convict him of violating § 1326. *Id.* While the Fifth Circuit was correct that "strik[ing] down the INA in its entirety" (or at least holding it unconstitutional as applied) would not confer citizenship on Cervantes-Nava, it would also prevent the application of the criminal provision under which he was convicted (which is § 276 of the INA, codified at 8 U.S.C. § 1326), thereby invalidating his conviction and affording him a remedy.

[12] Thus, at the very least, Flores-Villar's conviction should be vacated. Even if the Court were to determine that it lacked the power to hold Flores-Villar a citizen, it surely has the power—indeed the duty—to vacate a criminal conviction based on an unconstitutionally discriminatory law. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reversing criminal conviction where miscegenation statute violated Equal Protection). A person cannot be subjected to criminal punishment except by a valid rule of law. *See* Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1331-33 (2000) ("[I]t is almost universally acknowledged that criminal defendants must be set free when the statutes under which they were convicted are held invalid."). If the gender-based classifications in §§ 1401 and 1409 violate the Equal Protection guarantee, they cannot serve as the basis to establish the alienage element of Flores-Villar's criminal conviction under § 1326.

II. FLORES-VILLAR HAS STANDING TO CHALLENGE THE CITIZENSHIP STATUTE ON EQUAL PROTECTION GROUNDS.

A. Flores-Villar Has First-Party Standing Because He Is Asserting His Own Rights.

Standing should not present a serious issue in this case. While 8 U.S.C. §§ 1401 and 1409 define citizenship of children born outside the United States to unwed parents in terms of certain qualifications that the parents must satisfy, what they ultimately establish is the *child's* citizenship, or lack thereof. Here, Flores-Villar contends that his entitlement to citizenship at birth is unconstitutionally affected by the irrational gender-based classification in those provisions. That the discrimination in this case was not based on Flores-Villar's gender, but rather on his father's, does not make the gender-based classification less suspect or the impact on Flores-Villar's rights less substantial. Accordingly, properly understood, Flores-Villar is asserting his *own* right to "equal protection of the laws," as embodied in the Constitution's Equal Protection guarantee.

In such circumstances, there can be no serious question that Flores-Villar satisfies the constitutional prerequisites for standing. Article III's case-or-controversy standing limitation requires three things: (1) injury in fact (2) fairly traceable to challenged action that is (3) redressable by favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Flores-Villar has undoubtedly suffered an injury in fact: Not only was he denied citizenship solely on the basis of his father's gender, but he was also subjected to criminal sanctions on that basis. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) ("[t]here can be no question"

that criminal defendant has Article III standing). Moreover, that injury is fairly traceable to the unconstitutional classification in 8 U.S.C. §§ 1401 and 1409. And, as discussed above, that injury can be redressed by extending him citizenship and vacating his conviction.

Thus Flores-Villar stands in the same position as the criminal defendant in *Strauder v. West Virginia*, whose right to a fair trial was affected by an unconstitutional race-based classification in a juror selection statute. 100 U.S. 303, 308-09 (1879) (allowing criminal defendant to challenge state statute providing only white men could serve as jurors), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975). And his position is no different from a doctor challenging an abortion statute, who need not rely on his patient's rights, but has standing to assert his own right to be free from criminal sanctions except pursuant to a constitutionally valid rule of law. *See, e.g., Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 62 (1976). As in both of those situations, Flores-Villar has standing to challenge the suspect classification in §§ 1401 and 1409 in his own right. See Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1359-62 (2000).

B. Flores-Villar Also Has Third-Party Standing To Assert His Father's Rights

Flores-Villar also has standing to assert his father's right to Equal Protection under this Court's third-party standing doctrine. As a prudential matter, this Court has generally limited parties to asserting their own rights, *see Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 955 (1984), but the

Court has allowed litigants to assert the constitutional rights of others where (1) a litigant has suffered "an injury in fact," (2) the litigant has a "close relationship" to the other person, and (3) there was "some hindrance" to the other person "asserting" his "own rights." *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991)); *see also Craig v. Boren*, 429 U.S. 190, 194-97 (1976). All three of these requirements are easily met here.

1. There can be no serious dispute that Flores-Villar has suffered an injury in fact. Again, not only was he denied citizenship under §§ 1401 and 1409, but he has been criminally prosecuted and convicted. *See Powers*, 499 U.S. at 410-11 (criminal defendant suffered injury in fact); *Eisenstadt*, 405 U.S. at 443 (same). Indeed, in *Miller v. Albright*, all of the justices recognized that the denial of citizenship at birth to a child of a United States citizen constituted an injury in fact. 523 U.S. at 432 (opinion of Stevens, J.); *id.* at 447 (O'Connor, J., concurring in judgment); *id.* at 454 n.1 (Scalia, J., concurring in judgment); *id.* at 478 (Breyer, J., dissenting).

2. Flores-Villar also undoubtedly has a "close relationship" to his father. Beyond the blood relationship, which would itself be enough to demonstrate a sufficiently "close relationship" for the purposes of third-party standing, the record reflects that Flores-Villar lived with his father and his paternal grandmother in the United States from the age of two months through adulthood. *See* J.A. 31-32, 94-96 Every member of the Court in *Miller* (including Justice O'Connor, who wrote the only opinion denying standing), recognized that a child challenging a citizenship statute has a sufficiently

close relationship with his father for purposes of third-party standing, even where the child had not resided in the United States or with her citizen father before the age of 21. 523 U.S. at 432 (opinion of Stevens, J.); *id.* at 447 (O'Connor, J., concurring in judgment); *id.* at 454 n.1 (Scalia, J., concurring in judgment); *id.* at 478 (Breyer, J., dissenting).

3. Finally, Flores-Villar's father certainly faced at least "some hindrance" to his ability to assert his own right to be free from gender-based discrimination. As this Court has repeatedly explained, "practical barriers to suit" are important in determining third-party standing. *Powers*, 499 U.S. at 415. For example, in *Powers v. Ohio* and *Campbell v. Louisiana*, the Court held that the "economic burdens of litigation" and the "small financial stake involved" were sufficient "as a practical matter" to prevent racially excluded petit and grand jurors from bringing their own claims. 499 U.S. at 414-15; *see* 523 U.S. at 398, 400. Likewise, in *Craig v. Boren*, the Court recognized a beer vendor's standing to challenge a statute that discriminated against 18-20-year-old males where her co-plaintiff had lost the ability to sue when he turned 21. 429 U.S. at 192-97. Although there was "no barrier whatever" to other Oklahoma males between the ages of 18 and 20 asserting their equal protection claims, *id.* at 216 (Burger, C.J., dissenting), the Court explained that dismissing the claim would "foster repetitive and time-consuming litigation," and there was "little loss in terms of effective advocacy from allowing its assertion by the present jus tertii champion," *id.* at 194 (quotation marks omitted). *See Miller*, 523 U.S. at 454 n.1 (Scalia, J., concurring in judgment). Flores-Villar's father faced several significant barriers—far more substantial than those deemed

sufficient in *Campbell*, *Powers*, and *Craig*—to bringing his own suit asserting an Equal Protection violation.

First, unlike the father in *Miller v. Albright*, who was originally a party to the litigation, 523 U.S. at 426-27, Flores-Villar's father had no ability to intervene in his son's criminal prosecution. Thus, Flores-Villar's father had no opportunity to be heard at the critical time when his son's citizenship was being determined. *See Powers*, 499 U.S. at 414 (excluded jurors hindered because they had "no opportunity to be heard at the time of their exclusion"); *see also Miller*, 523 U.S. at 449 (O'Connor, J., concurring in judgment) (individual is hindered when he is "not part[y] to the proceeding"); *Eisenstadt*, 405 U.S at 446 ("[T]he case for according [doctors convicted of distributing contraceptives] standing to assert third-party rights is stronger . . . here than in *Griswold* [*v. Connecticut*, 381 U.S. 479, 481 (1965)] because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights."). This is one of the many reasons why this Court has routinely extended third-party standing to criminal defendants challenging their convictions under unconstitutional statutes or conditions.[13]

---

[13] *See, e.g.*, *Campbell*, 523 U.S. at 397-400; (white criminal defendant has standing to challenge exclusion of blacks from grand jury); *Powers*, 499 U.S. at 410-11 (white criminal defendant has standing to challenge racially motivated peremptory strike of black juror); *Eisenstadt*, 405 U.S. at 444-45 (defendant convicted of distributing contraceptives had standing to raise equal protection rights of unmarried persons to access

Second, "privacy concerns" also "provide a compelling explanation" for hindrance here. *Miller*, 523 U.S. at 449 (O'Connor, J. concurring in judgment). A person in Flores-Villar's father's position could easily be deterred or "chilled" from asserting his right to convey citizenship to his children if it would draw attention to his children's immigration status and presence in the country. A citizen father may be understandably reluctant to take affirmative steps that may expose his children to removal proceedings or even criminal prosecution, even if he believes in good faith that he should prevail. *See, e.g.*, *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 n.4 (1977) (vendor could challenge law prohibiting distribution of contraceptives to minors because desire to avoid publicity would deter potential purchasers from asserting their own rights); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958) (organization could raise privacy rights of its members because litigation would disclose their identities).

(continued...)

contraceptives); *Griswold*, 381 U.S. at 481 (physician convicted as accessory to use of contraception had standing to raise privacy rights of married couples); *Strauder*, 100 U.S. at 308-09 (allowing criminal defendant to challenge state statute providing only white men could serve as jurors); *cf. Dep't of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990) (attorney in disciplinary proceedings had standing to challenge fee restriction by asserting due process rights of client); *Craig*, 429 U.S. at 194-97 (beer vendor subject to sanctions and loss of license for selling beer in violation of statute that discriminated against 18-20-year-old men had standing to challenge statute).

Third, and perhaps most importantly, denying a child facing an enforcement action standing to assert his father's right to convey citizenship would "frustrate Congress's effort to channel" all challenges to removal through "the detailed procedure that Congress instituted for review of removal proceedings." *Ortega v. Holder*, 592 F.3d 738, 743-44 (7th Cir. 2010); *see also Rios-Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 393, 396-99 (5th Cir. 2007). Congress has demonstrated a clear preference that all questions of citizenship or nationality that first arise in an enforcement action involving the person whose citizenship is at stake, such as a removal proceeding, be resolved in that process and not in a separate declaratory judgment action. Under 8 U.S.C. § 1503(a), a person subject to removal proceedings cannot institute an action for a declaratory judgment that he is a citizen or national if the question was at issue in removal proceedings. He must, instead, seek review of the removal proceedings in the circuit courts under 8 U.S.C. § 1252, and, if the circuit court finds a genuine issue of material fact as to the petitioner's nationality, it will transfer the case to a district court for a declaratory judgment action to proceed. *Id.* § 1252(b)(5)(B); *see also Ortega*, 592 F.3d at 744. Limiting standing to the citizen-father, in contrast, would not only permit but would require the father to initiate a declaratory judgment action to establish his child's citizenship. It would thus not only authorize, but require, an end run around the restriction in § 1503(a) and the "detailed procedure" set up by Congress for the orderly administration of removal proceedings. *Id.*

Thus here, as in *Craig*, Flores-Villar "is the 'least awkward challenger,' since it is [his] right to

citizenship that is at stake." *Miller*, 523 U.S. at 454 n.1 (Scalia, J., concurring in judgment) (quoting *Craig*, 429 U.S. at 197). The prudential concerns underlying the limitations on third-party standing are not present in this case. *See Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (prudential concerns that third parties may not wish to assert rights and that third parties "usually will be the best proponents of their own rights" underlie limitation). Flores-Villar is well suited to assert the rights at stake in this case. *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (prudential barriers seek "to limit access to the federal courts to those litigants best suited to assert a particular claim"). He has a real interest in vindicating the rights at stake in the litigation—perhaps even stronger than his father's interest—and his interests are aligned with those of his father. Faced with criminal sanction and the loss of his entitlement to citizenship, there can be little question that Flores-Villar "is fully, or very nearly, as effective a proponent of the right" at stake as his father. *Singleton*, 428 U.S. at 115.

* * *

For any of these reasons, as the majority of the members of the Court recognized in *Miller*, a child has standing to invoke the jurisdiction of the federal courts to challenge a statute that unconstitutionally discriminates against his entitlement to citizenship at birth or his father's ability to transmit citizenship to him. 523 U.S. at 432 (opinion of Stevens, J., joined by Rehnquist, C.J.); *id.* at 454 n.1 (Scalia, J., concurring in judgment, joined by Thomas, J.); *id.* at 478 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.). Indeed, Flores-Villar's standing is even more apparent. Unlike the child in *Miller*,

Flores-Villar did not invoke the jurisdiction of the federal courts by affirmatively applying for citizenship and then filing a declaratory judgment action. *See id.* at 426. Rather, Flores-Villar found himself in court involuntarily as a criminal defendant. There can be little question that Flores-Villar has standing to challenge the constitutionality of the statute that both deprives him of citizenship and forms the basis for his criminal conviction.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to reverse the Ninth Circuit's decision.

Respectfully submitted.

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle St.,
Suite 1818
Chicago, IL 60604
(312) 660-1613

DEBORAH S. SMITH
STEPHEN W. MANNING
AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW, Suite 300
Washington, DC 20005
(202) 507-7600

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Dr.,
Suite 3500
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

D. THEODORE RAVE
JONES DAY
222 East 41st St.
New York, NY 10017
(212) 326-3939

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 09-5801

SUPREME COURT, U.S.
FILED
JUN 25 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RUBEN FLORES-VILLAR, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

MARCIA D. GREENBERGER
EMILY J. MARTIN
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W.
Suite 800
Washington, DC 20036
emartin@nwlc.org
(202) 588-5180

Counsel for Amici Curiae

DEANNE E. MAYNARD
BRIAN R. MATSUI
Counsel of Record
SETH M. GALANTER
KAREN E. ESCALANTE
KLINTON S. MIYAO
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
bmatsui@mofo.com
(202) 887-8784

Counsel for National Women's Law Center

JUNE 25, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BOTH 507MK1 077 '15

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
THE GENDER-BASED DIFFERENCES IN RESIDENCY REQUIREMENTS FOR CONVEYING CITIZENSHIP TO CHILDREN VIOLATE EQUAL PROTECTION	7
A. *Nguyen v. INS* Does Not Dictate The Outcome In This Case	8
B. There Is No Legitimate Basis For Gender-Based Distinctions Between Unmarried Mothers And Those Unmarried Fathers Who Have Acknowledged And Undertaken Responsibility For Their Children	12
C. There Is No Justification For The Gender-Based Residency Requirement Other Than Out-Dated Stereotypes About The Roles Of Unmarried Men And Women In Caring For Their Children	22
1. The discriminatory means do not further the government's objective of encouraging familial ties	22
2. The discriminatory means do not further the government's objective of preventing statelessness	24
CONCLUSION	27

TABLE OF CONTENTS – Continued

Page

APPENDIX

List of Amici Curiae.....1a

TABLE OF AUTHORITIES

Page

CASES:

Caban v. Mohammed, 441 U.S. 380 (1979) 9, 18

Craig v. Boren, 429 U.S. 190 (1976).....13

Lehr v. Robertson, 463 U.S. 248 (1983).....19

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).....7, 13

Nguyen v. INS, 533 U.S. 53 (2001) .....*passim*

Orr v. Orr, 440 U.S. 268 (1979).....25, 26

Pierce v. Society of the Sisters, 268 U.S. 510 (1925).....19

Stanley v. Illinois, 405 U.S. 645 (1972).....9, 19

Stanton v. Stanton, 421 U.S. 7 (1975).....10

United States v. Virginia, 518 U.S. 515 (1996).....4, 7, 13, 25

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).....19

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).....13, 19, 26

Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).....26

U.S. CONSTITUTION & STATUTES:

U.S. Const. amend. V (Due Process Clause) 3, 10

U.S. Const. amend. XIV, § 1 (Equal Protection Clause).....7, 9

TABLE OF AUTHORITIES – Continued

Page

Immigration and Nationality Act, 8 U.S.C. §§ 1401(a)(7) & 1409 (1974) 3, 11

8 U.S.C.

§ 1401(g) 3

§ 1409(a) 9

§ 1409(a)(4) 3, 8, 9

§ 1409(c) 3

OTHER AUTHORITIES:

Administration for Children & Families, U.S. Dep't of Health & Hum. Servs., *The Rights of Presumed (Putative) Fathers* (Oct. 2007) 21

Administration for Children & Families, U.S. Dep't of Health & Hum. Servs., *Voluntary Relinquishment for Adoption* (Mar. 2005) 18

Paul R. Amato, Catherine E. Meyers & Robert E. Emery, *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 Fam. Rel. 41 (Feb. 2009) 16

Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *Dispelling Myths about Unmarried Fathers*, 1 Fragile Families Research Brief (May 2000) 16

Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 30 Fragile Families Research Brief (Feb. 2005) 14, 17

TABLE OF AUTHORITIES – Continued

Page

Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *Parents' Relationship Status Five Years After a Non-Marital Birth*, 39 Fragile Families Research Brief (June 2007) 15, 17

Marcia Carlson et al., *Coparenting and Non-resident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461 (May 2008) 14, 16

Richard W. Flournoy, Jr., A COLLECTION OF NATIONALITY LAWS (1930) 23, 25

Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws That Currently Deny Adequate Protection*, 13 Mich. J. Gender & L. 39 (2006-2007) 20

Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2007*, Current Population Reports (Nov. 2009) 15

Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, 57 Nat'l Vital Statistics Reps. (Mar. 18, 2009) 14

Ruth-Arlene W. Howe, *Legal Rights and Obligations: An Uneven Evolution*, in YOUNG UNWED FATHERS; CHANGING ROLES AND EMERGING POLICIES 141 (Robert I. Lerman & Theodora Ooms eds. 1993) 21

TABLE OF AUTHORITIES – Continued

Page

Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Dispute – 1920, 1960, 1990 and 1995*, 31 Fam. L.Q. 215 (1997-1998) 19

Nat'l Center for Health Statistics, U.S. Dep't of Health & Hum. Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, 23(27) Vital & Health Statistics (Aug. 2008) 18

Nat'l Center for Health Statistics, U.S. Dep't of Health & Hum. Servs., *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth*, 23(28) Vital & Health Stats. (Feb. 2010) 15

Nat'l Conference of State Legislatures, *State Legislation: Putative Father Registries* (Nov. 2009) 20, 21

Nat'l Responsible Fatherhood Clearinghouse Quick Statistics: Nonresident Fathers (2008) 17

U.S. Census Bureau, U.S. Dep't of Commerce, *America's Families & Living Arrangements: 2009 Table FG6* (2009) 15

U.S. Census Bureau, U.S. Dep't of Commerce, *America's Families & Living Arrangements: 2009 Table HH-1* (2009) 20

TABLE OF AUTHORITIES – Continued

Page

Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, 18 Nat'l Center for Health Statistics Data Brief (May 2009) 14

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

The National Women's Law Center and 22 other organizations that seek an end to all forms of discrimination respectfully submit this brief as amici curiae in support of petitioner.[1]

INTEREST OF AMICI CURIAE

The National Women's Law Center (NWLC) is a non-profit legal organization that has worked since 1972 to advance and protect women's legal rights. The NWLC focuses on major areas of importance to women and their families, including income security, employment, education, and reproductive rights and health, with special attention to the needs of low-income women. The NWLC has participated as counsel or amicus curiae in a range of cases before this Court to secure the equal treatment of women under the law.

---

[1] Pursuant to Rule 37.3(a), a copy of a letter consenting to the filing of this brief by petitioner and a blanket letter from respondent consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The NWLC and other amici curiae have a strong interest in ensuring that all persons receive equal protection of the law under the Constitution and in protecting mothers, fathers, and children from the harm gender-stereotyped laws can inflict. The provisions at issue in this case use gender-based distinctions in order to determine who is a citizen of the United States without justification. As discussed below, these distinctions appear to be based on and perpetuate outdated stereotypes of fathers and mothers: namely, that unmarried fathers will not form lasting relationships with their children and that unmarried mothers will bear all responsibility for the care of their children.

A description of each of the amici is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

The issue in this case is whether a gender-based distinction in the Immigration and Nationality Act, 8 U.S.C. §§ 1401(a)(7) & 1409 (1974),[2] violates the equal protection component of the Fifth Amendment's due process clause. For an unmarried citizen father to transmit citizenship to a child born abroad, the father must have lived in the United States for ten years before the birth of the child, with at least five of those years occurring after the age of 14. Unmarried United States citizen mothers, however, need only satisfy a one-year residency requirement to convey citizenship to their children born abroad. This classification treats unmarried United States citizen mothers differently from unmarried United States citizen fathers. The government has offered no persuasive justification for this distinction, much less the exceedingly persuasive one that is required to withstand heightened scrutiny.

A. The issue raised by this case arises only after a United States citizen father, like petitioner's father here, has met the legitimacy and paternity requirements of 8 U.S.C. § 1409(a)(4) for conferring United States citizenship. Therefore, *Nguyen v. INS*, 533 U.S. 53 (2001)—which sustained these requirements on fathers but not mothers—does not control the outcome of this case, because this class of

---

[2] These provisions, as amended, are now codified at 8 U.S.C. §§ 1401(g) and 1409(c).

unmarried citizen fathers is similarly situated to unmarried citizen mothers.

Moreover, unlike the requirements that *Nguyen* addressed, the residency requirement presents an insurmountable obstacle to certain unmarried citizen fathers. Indeed, for petitioner's father and other fathers who were under 19 when their children were born, the residency requirement flatly bars the conveyance of citizenship, even if they have lived their whole lives in the United States. While every father has the opportunity to comply with the legitimation and paternity requirements addressed in *Nguyen*, the residency requirement at issue here can never be met if it is not already satisfied at the moment of the child's birth.

B. The government's decision to impose a greater burden on unmarried fathers than unmarried mothers perpetuates the stereotype that unmarried fathers always have less meaningful relationships with their children than unmarried mothers. This Court has rejected the use of such stereotypes to justify gender-based distinctions, even if they have some basis in fact. *United States v. Virginia*, 518 U.S. 515 (1996). If the stereotype that unmarried fathers are always absent and uninvolved were ever true, it is not true today. And that stereotype cannot justify treating fathers who have taken steps to establish a relationship with their children differently from mothers.

The shifting cultural norms and attitudes about the relationship of marriage to parenting make the gender of the parent a very imprecise proxy for a parent's relationship with his or her child. Empirical research suggests that 40% of births today are nonmarital births. The majority of these births are to cohabiting couples. Even when fathers do not live with their children, the data suggest that today's unmarried fathers are more involved in their children's lives than ever before.

Nor does empirical evidence support the assumption that mothers will automatically assume all responsibility for raising and financially supporting their nonmarital children. Unmarried fathers have increasingly become custodial parents to their children, and recent data show that such custodial fathers are now owed over $4 billion in child support annually.

This Court and state laws have recognized that there is no basis for absolute, gender-based distinctions between unmarried fathers who have recognized their children and unmarried mothers. State laws now guarantee certain rights for "putative fathers" and impose obligations on such fathers. And all States offer unmarried fathers the opportunity to acknowledge the paternity of their children through putative father registries or filings of acknowledgment with certain state agencies or courts. In addition, all States have eliminated the presumption that a child's mother should necessarily have custody of a child.

C. The gender-based distinctions at issue in this case do nothing to further the government's purported objective of encouraging a relationship between parent and child. The residency requirements are only determinative for those citizen fathers who have met the other requirements for conveying citizenship and thus have taken steps to form a relationship with their child.

In some instances, moreover, the residency requirement will actually have the perverse effect of discouraging an unmarried father from establishing paternity and acknowledging a nonmarital child. For example, in many Middle Eastern countries, where nationality is based on the father unless the father is not known or chooses not to establish paternity, an unmarried American citizen father's decision to recognize his child can leave that child stateless. This may lead fathers not to establish paternity.

Nor are the gender-based distinctions substantially related to preventing statelessness. In countries where citizenship is expected to flow from the father, the requirements will actually have the effect of rendering stateless the children of those unmarried fathers who cannot meet the requirements. Because the distinctions are not substantially, or even rationally, related to the government's purported objectives, they are unconstitutional.

ARGUMENT

THE GENDER-BASED DIFFERENCES IN RESIDENCY REQUIREMENTS FOR CONVEYING CITIZENSHIP TO CHILDREN VIOLATE EQUAL PROTECTION

The statutes at issue create a classification that facially discriminates on the basis of gender: they favor unmarried citizen mothers over unmarried citizen fathers, requiring fathers to have spent more time in the United States to convey citizenship to children born outside the territorial United States. This gender-based classification must be subjected to heightened scrutiny. To defend it, the government must demonstrate "'an exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quotation marks omitted). The government has the burden of showing "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 533 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). In so doing, the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* Because the government cannot sustain this burden, the classification is unconstitutional.

A. *Nguyen v. INS* Does Not Dictate The Outcome In This Case

In sustaining the differential residency requirements at issue in this case, the court below evoked the reasoning of this Court in *Nguyen v. INS*, 533 U.S. 53 (2001). J.A. 170a. However, *Nguyen* is not controlling.

1. In contrast to *Nguyen*, the unmarried fathers and unmarried mothers at issue here are similarly situated in their relation to their children.

In *Nguyen*, the Court sustained a requirement, imposed only on unmarried citizen fathers, that requires them to legitimate, or formally establish or acknowledge paternity, before the child reaches the age of 18 in order to convey citizenship. *See* 8 U.S.C. § 1409(a)(4). The Court found the challenged requirements substantially related to the government's interest in ensuring that citizenship will pass from unmarried parent to foreign-born child only when "the child and the citizen parent have some demonstrated opportunity or potential to develop * * * a relationship * * * that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Nguyen*, 533 U.S. at 64-65. The Court determined that this opportunity necessarily occurred at birth for mothers. Because fathers have a different relationship to the moment of birth, the Court further concluded that for unmarried fathers it was appropriate to condition conveyance of citizenship on

some formal demonstration that the father was aware of the child and had acknowledged him or her.

The residency requirements challenged here are relevant only for those fathers who have met the other statutory requirements for conveying citizenship, including those upheld in *Nguyen*: they are aware of their child, have agreed to support their child, have a demonstrated blood relationship with their child, and have formally established a relationship with their child before the child reaches 18. *See* 8 U.S.C. § 1409(a)(4).[3]

As a class, these fathers are similarly situated to unmarried mothers in their relationship to their child. Over thirty years ago, this Court recognized that "maternal and paternal roles are not invariably different in importance." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979). Accordingly, the Court found an unmarried father who admitted paternity and established a relationship with his child to be similarly situated to an unmarried mother. *Id.* at 394. On this basis, the Court struck down an "undifferentiated distinction between unwed mothers and unwed fathers" as an overbroad generalization on the basis of gender in violation of the Equal Protection Clause. *Ibid.*; *see also Stanley v. Illinois*, 405 U.S.

---

[3] Section 1409(a) now imposes additional requirements on a father that are not applicable to this case. Petitioner's father satisfied the then-operative legitimation and paternity requirements of Section 1409(a).

645 (1972) (holding that a presumption that an unmarried father was an unfit parent violates the Due Process Clause). Whether or not the Constitution is otherwise offended by gender-based distinctions between unmarried mothers and fathers, when unmarried fathers take steps of the sort affirmed in *Nguyen* and create a legal bond with their child, fulfill their financial obligations, and develop the opportunity to establish a meaningful relationship, the Constitution does not permit distinctions between parents based solely on gender. *See, e.g.*, *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (classifications must rest on some difference having a substantial relationship to the object of the legislation, so that persons similarly situated are treated alike). The fathers affected by the residency requirement have taken these steps.

2. The governmental objective accepted by the Court in *Nguyen* does not support the gender-based residency requirements at issue in this case.

The residency requirement at issue prohibits children like the petitioner from ever inheriting their father's citizenship, regardless of the form, duration, or content of their relationship with their father. Thus, it cannot be said to promote the development of a "sufficiently recognized or formal relationship" between a child and his citizen father or to foster "the real, everyday ties" that bind parent and child. *Nguyen*, 533 U.S. at 79, 65. Indeed, the inability to transfer citizenship to one's children would appear repugnant to those goals.

Moreover, the disparate treatment of similarly situated unmarried citizen mothers and fathers cannot be claimed to encourage a connection between parent, child, and country. In the 70 years over which the provisions at issue have been enacted and amended, the government has never set forth any basis for concluding that, while unmarried fathers must reside in the United States for ten years (with five of those being after the age of 14), to form a sufficient connection to the country to pass on United States citizenship, unmarried mothers are capable of forming the same connection to the United States by residing here for one year at any time in their lives. There is no rational basis for such a conclusion. Pet. Br. 7-10.

3. Further, unlike in *Nguyen*, the gender-based classification in this case is, for some citizen fathers, an absolute bar to conveying citizenship to their children. In particular, a child born to an unmarried citizen father under the age of 19, or to one who spent less than 10 years in the United States before the child's birth, cannot under any circumstances inherit the citizenship of his father. This absolute prohibition presented by Sections 1401(a)(7) and 1409 stands in stark contrast to the provision analyzed in *Nguyen*, with which every citizen father has the power to comply. Indeed, the Court upheld the legitimating requirement in part because "the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is

minimal." *Nguyen*, 533 U.S. at 70-71 (emphasis added).

B. There Is No Legitimate Basis For Gender-Based Distinctions Between Unmarried Mothers And Those Unmarried Fathers Who Have Acknowledged And Undertaken Responsibility For Their Children

In cases such as this, the nonmarital child would have acquired United States citizenship at birth, but for the gender of the citizen parent. Petitioner's father, and similarly situated unmarried citizen fathers, are statutorily unable to convey their citizenship to their children, even when they assume the responsibility of raising, caring for, and financially supporting them, simply because they are not mothers. Conversely, an unmarried citizen mother who has lived one year in the United States at any point during her life will always be able to pass on citizenship, regardless of whether she supports, raises, or indeed forms any meaningful relationship with her child.

The challenged provisions at issue in this case thus appear to perpetuate the stereotype that even when an unmarried father has fully assumed his obligations to his child and created a meaningful relationship with that child, his parental connection will always be lesser than that of an unmarried

mother. This stereotype should find no comfort in this Court's jurisprudence.[4]

Whether or not that stereotype was ever accurate, it is not today. Indeed, due to shifting cultural norms and attitudes both about the relationship of marriage to parenting and about the roles of fathers and mothers in their children's lives, the gender of an unmarried parent serves as a very imprecise proxy for a parent's relationship with his or her child. *Cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (even a generalization as to gender roles with some empirical support cannot justify burdening those who depart from the norm); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (striking down gender classification because of "weak congruence" between gender and the characteristic that gender purported to represent). There is no reason to believe that this shift does not apply with equal force to United States citizens when they are outside the Nation's territorial borders.

---

[4] It is of no moment that the statutes at issue may, in some instances, serve to benefit unmarried mothers. *Mississippi Univ. for Women*, 458 U.S. at 723-724. This Court has consistently shown no tolerance for classifications that are based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" regardless of whether they are targeted at men or women. *Virginia*, 518 U.S. at 533. While sex classifications may be used in certain circumstances to compensate women for discrimination they have suffered, *ibid.*, there is no evidence of such discrimination here. *See*, Section C, *infra*.

1. Recent empirical research has captured the shift in the relationships of unmarried fathers with their nonmarital children, which has coincided with nonmarital parenting becoming more common.

Since the latter half of the past century, there has been a documented upward trend in unmarried childbearing, both in the United States and in other countries, with levels doubling, tripling, and in some countries increasing by many multiples. Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, 18 Nat'l Center for Health Statistics Data Brief 5 (May 2009).[5] In the United States, for instance, the level of nonmarital births between 1980 and 2007 more than doubled, rising from 18% to 40% of all births. *Ibid.*; *see also* Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, 57 Nat'l Vital Statistics Reps. 13 (Mar. 18, 2009), *available at* http://tinyurl.com/NVSR-Mar2009 (last visited June 24, 2010). More than half of nonmarital children in the United States are now

---

[5] *Available at* http://tinyurl.com/Ventura-NCHS-May2009 (last visited June 24, 2010); *see also* Marcia Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461 (May 2008); Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 30 Fragile Families Research Brief (Feb. 2005), *available at* http://tinyurl.com/FFR-Feb2005 (last visited June 24, 2010); Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, 57 Nat'l Vital Statistics Reps. 3 (Mar. 18, 2009), *available at* http://tinyurl.com/NVSR-Mar2009 (last visited June 24, 2010).

born to unmarried but cohabiting parents. Nat'l Center for Health Statistics, U.S. Dep't of Health & Hum. Servs., *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth*, 23(28) Vital & Health Stats. 4 (Feb. 2010), *available at* http://tinyurl.com/CDC-Feb2010 (last visited June 24, 2010). These data indicate that most children born out-of-wedlock are now born to established couples that live together and simply have not married. They also demonstrate the falsity of popular stereotypes that most nonmarital children are born to parents involved in only casual relationships or that unwed fathers are typically unaware of or have no relationship with their nonmarital children. *See* Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *Parents' Relationship Status Five Years After a Non-Marital Birth*, 39 Fragile Families Research Brief (June 2007), *available at* http://tinyurl.com/FFR-Feb2007 (last visited June 24, 2010).

Moreover, in 2009, 15% of single parents with primary physical custody of their children were men, and of those 29% (approximately 510,000 fathers) had never been married. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *America's Families & Living Arrangements: 2009 Table FG6*, *available at* http://tinyurl.com/census-TableFG6 (last visited June 24, 2010). Recent data show that custodial fathers were due $4.3 billion in child support in 2007 from their children's mothers. Timothy S. Grall, *Custodial*

Mothers and Fathers and Their Child Support: 2007, Current Population Reports 2 (Nov. 2009), *available at* http://tinyurl.com/Grall-Nov2009 (last visited June 24, 2010).

Even when the father does not have custody of his child and is not cohabiting with the mother, an increasing number of unmarried fathers since the 1970's have assumed obligations to their nonmarital children and are involved in their nonmarital children's lives. Paul R. Amato, Catherine E. Meyers & Robert E. Emery, *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 Fam. Rel. 41, 49 (Feb. 2009). Fathers' levels of involvement and contact with their nonresident children have increased, even when they are no longer romantically involved with their nonmarital children's mothers. *Ibid.*; *see also* Marcia Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461, 472 (May 2008) (reciting statistics on number of nonresident fathers who maintain contact with their child at years 1, 3, and 5).

In a large study of births to unmarried parents in major cities across the United States, virtually all of the fathers interviewed reported that they wanted to be involved in raising their children in the coming years. Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *Dispelling Myths about Unmarried Fathers*, 1 Fragile Families Research Brief (May 2000), *available at* http://tinyurl.com/FFR-May2000 (last visited June 24, 2010). Two-thirds of

the unmarried fathers in the study had seen their children in the month before follow-up interviews conducted at the five-year mark. *Parents' Relationship Status Five Years After a Non-Marital Birth*, *supra*, at 2. And 2002 data from the National Center for Health Statistics show that about three in four nonresident fathers are in contact with their children. Nat'l Responsible Fatherhood Clearinghouse Quick Statistics: Nonresident Fathers (2008), *available at* http://tinyurl.com/nonresident-fathers2008 (last visited June 24, 2010).

In addition, recent statistical data based on a national sampling of unmarried mothers demonstrate that the paternity establishment rate for nonmarital children born between 1998 and 2000 was 70%. Even when the father was "not residing with the mother at the time their child was born * * * a majority of these men (58%) had [voluntarily] established paternity by the time the child was one year old." Bendheim-Thoman Center for Research on Child Wellbeing, Princeton Univ., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 30 Fragile Families Research Brief at 2 (Feb. 2005), *available at* http://tinyurl.com/FFR-Feb-2005 (last visited June 24, 2010).

2. The converse assumption that unmarried mothers will invariably assume all responsibility for raising and financially supporting their nonmarital children is also not valid. To state the obvious, when children are in the primary physical custody of their father, as is the case for the approximately 510,000

never married fathers discussed above, they are not in the primary physical custody of their mother.

In addition, some estimates indicate that approximately 14,000 children were voluntarily relinquished by unmarried mothers in 2003. Administration for Children & Families, U.S. Dep't of Health & Hum. Servs., *Voluntary Relinquishment for Adoption* (Mar. 2005), *available at* http://tinyurl.com/voluntary-adoption (last visited June 24, 2010); *see also* Nat'l Center for Health Statistics, U.S. Dep't of Health & Hum. Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, 23(27) Vital & Health Statistics 2 (Aug. 2008), *available at* http://tinyurl.com/CDC-Aug2008 (last visited June 24, 2010). The fact that some children are relinquished by their unmarried mothers further demonstrates that not all unmarried mothers will support, raise, or even form a relationship with their nonmarital children.

3. The law reflects this shift away from the gender-based stereotype that mothers necessarily bear sole responsibility for nonmarital children, while unmarried fathers have neither obligations toward nor rights in regard to their children. As noted above, this Court has rejected gender-based distinctions between similarly situated unmarried fathers and unmarried mothers. *Caban*, 441 U.S. at 394. Whether male or female, "those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional

obligations." *Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925); *cf. Weinberger*, 420 U.S. at 652 ("It is no less important for a child to be cared for by its sole surviving parent when the parent is male than when the parent is female.").

Over the past 60 years, state laws have also imposed certain minimum obligations on and recognized certain rights for unwed fathers. These laws are consistent with this Court's seminal decisions in *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). By requiring States to protect a putative father's "opportunity" to form a parental relationship, and once formed to protect it fully, this Court's decisions supported other contemporaneous changes in state family law practice and ushered in an era of expanded rights for the unwed father. Simultaneously, this Court's decisions in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), and cases following *Weber*, established that nonmarital children had legal claims to benefits and inheritance through their father, thus overturning the legal tradition that held fathers free from obligation to their nonmarital children.

Perhaps most significantly, since 1960, States have been eliminating the presumption that a child's mother should have custody of a child. The final State eliminated the last vestige of this gender-based stereotype over a decade ago, in 1997. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Dispute—1920, 1960, 1990 and 1995*, 31

Fam. L.Q. 215, 220 & n.32 (1997-1998). Indeed, historical data shows that the number of male family households (as opposed to female family households, or married couple family households) has increased from approximately 2.7% to 6.7% since 1960, a faster rate of increase than female family households. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *America's Families & Living Arrangements: 2009 Table HH-1*, http://tinyurl.com/census-TableHH1 (last visited June 24, 2010).

Recognizing the increasing role that unmarried fathers can and should play in the lives of their children, all States have also created mechanisms by which a child's paternity can be voluntarily recognized before that child reaches the age of 18.[6] Approximately twenty-four States have "putative father" registries,[7] and thirteen States and the District of Columbia have provisions for voluntary acknowledgement of paternity through State agencies,

---

[6] Nat'l Conference of State Legislatures, *State Legislation: Putative Father Registries* (Nov. 2009), *available at* http://tinyurl.com/putative-father-registries (last visited June 24, 2010).

[7] Putative father registries "allow fathers to register with the state and claim that they are, or even suspect that they are, the father of a child. * * * [R]egistration grants a father standing in an adoption proceeding, * * * allowing him to argue for what he thinks is in the child's best interest." Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws That Currently Deny Adequate Protection*, 13 Mich. J. Gender & L. 39, 48-49 (2006-2007).

including registrars of vital statistics. A father's "[a]cknowledgement of paternity provides [him] with the right to receive notice of court proceedings regarding the child, including petitions for adoption or actions to terminate parental rights." Administration for Children & Families, U.S. Dep't of Health & Hum. Servs., *The Rights of Presumed (Putative) Fathers* (Oct. 2007), *available at* http://tinyurl.com/putative-fathers (last visited June 24, 2010). And in twenty-one States, a person may claim paternity by filing an affidavit or acknowledgement of paternity with a court.[8] Moreover, in all States, "most unwed fathers can expect to have the full financial obligations of parenthood imposed upon them." Ruth-Arlene W. Howe, *Legal Rights and Obligations: An Uneven Evolution*, *in* YOUNG UNWED FATHERS; CHANGING ROLES AND EMERGING POLICIES 141, 164 (Robert I. Lerman & Theodora Ooms eds. 1993) (emphasis omitted).

The different residency requirements that immigration statutes impose on unwed citizen mothers and unwed citizen fathers are thus grounded on outdated and overbroad generalizations about the parenting roles of unwed mothers and fathers.

---

[8] *Putative Father Registries*, *supra*; *The Rights of Presumed (Putative) Fathers*, *supra*.

C. There Is No Justification For The Gender-Based Residency Requirement Other Than Out-Dated Stereotypes About The Roles Of Unmarried Men And Women In Caring For Their Children.

1. The discriminatory means do not further the government's objective of encouraging familial ties

As discussed above, the preferential treatment of unmarried mothers cannot be supported by any interest in assuring a connection between parent, child, and country given that the fathers affected have established relationships with their children. Indeed, the disparate treatment of mothers and fathers is in direct conflict with any government interest in encouraging a relationship between parent and child. In some instances, the residency requirement imposed on fathers creates a powerful disincentive to establishing paternity and acknowledging the nonmarital child.

This is so because, as petitioner and other amici have shown, various countries where citizenship is customarily inherited through the father make an exception to this rule in certain circumstances. They permit an unmarried mother to pass her citizenship to the child, but do so only if the child's father is unknown, has not acknowledged the child, or has not legitimated the child. Thus, in countries including Bahrain, Burundi, Cote d'Ivoire, Jordan, Kuwait,

Swaziland, Tunisia, Yemen, and others,[9] a father who establishes paternity or who legitimates a child will deprive the child of the citizenship derived through the mother. If the father cannot offer his own citizenship in exchange, then he would be forced to make his child stateless to establish a relationship with him or her.

In 1940, when the discriminatory residency requirements at issue were adopted, an even larger swath of countries did not permit an unmarried mother to convey her citizenship once the father acknowledged the nonmarital child. For example, in Germany, Romania, and China, citizenship of the child was based on the nationality of the father *unless* the mother was unmarried *and* the father was unknown or paternity had not been established. *See, e.g.*, Br. of Scholars on Statelessness; Richard W. Flournoy, Jr., A COLLECTION OF NATIONALITY LAWS 177 (1930).

If, as in this case, the citizen father does not meet the statutory residency requirement and is thus prevented from passing United States citizenship to his child, the residency requirements in these countries will discourage establishing paternity because doing so would render the child stateless. The residency differential thus not only reflects but actually tends to *perpetuate* the gender stereotype that an unmarried father will not acknowledge or

---

[9] *See* Appendix to Br. of Scholars on Statelessness.

support his children. It creates a significant disincentive to establish paternity and, in so doing, threatens harm to mothers, fathers, and children. In this way, the residency differential works in opposition to the asserted objective of encouraging a tie between parent, child, and state. As a result it is not substantially, or even rationally, related to that objective.

2. The discriminatory means do not further the government's objective of preventing statelessness

As petitioner and other amici have shown, the interest in avoiding stateless children also cannot sustain the gender-based classification. Even if the interest in avoiding statelessness among foreign-born children of United States citizens was the actual reason (and not merely a *post hoc* rationalization) for the different residency requirements, the classification is so under-inclusive it lacks any "fit" with the ends it purports to serve, and is certainly not substantially related to those ends.

An unmarried mother's ability to convey citizenship does not turn on whether her child would otherwise be stateless, but simply on whether she has previously lived in the United States for a year. In contrast, the residency requirements fail to address the real risk of statelessness for children of unmarried citizen fathers. In multiple countries today (and even more in 1940 when the law was passed) the non-marital children of United States

citizen fathers are also at significant risk of statelessness. In many middle-Eastern and some African countries, these children are barred from inheriting their mothers' citizenship, or are permitted to inherit their mothers' citizenship only in certain circumstances, such as when the identity of the father is unknown or when the father has not established paternity.

The challenged provisions actually aggravate the statelessness problem in these countries by imposing a substantial obstacle on a United States citizen father's ability to convey citizenship to the child he has acknowledged. Indeed, they prohibit an unmarried citizen father under the age of 19 from ever conveying his citizenship, even to a legitimated child. Thus, in countries, such as Jordan, Qatar, or Sudan, where the child takes the citizenship only of the father, a child born to an unmarried mother and United States citizen father under the age of 19 would necessarily be rendered stateless. Br. of Scholars on Statelessness.

A gender-based classification cannot be substantially related to an actual and important state interest when it serves to undermine that interest. *Virginia*, 518 U.S. at 533; *Orr v. Orr*, 440 U.S. 268, 282 (1979) (striking down gender classification that created "perverse results" in conflict with statutory objective). Indeed, because the differential will lead to statelessness in some circumstances, the statutes at issue cannot even be said to be rationally related to

preventing the result they were purportedly enacted to prevent.

If statelessness were the government's genuine concern, a gender-neutral method would address the problem far more effectively. Given the government's representation below that it is impractical to convey citizenship based on an individualized determination that statelessness would otherwise result (C.A. Appellee Br. 21), the better response would be to apply the same one-year residency requirement to all unmarried citizen parents, thus protecting against statelessness for children of citizen mothers *and* citizen fathers. The existence of comparable or superior gender-neutral alternatives has previously led this Court to reject gender-based classifications. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr*, 440 U.S. at 281; *Weinberger*, 420 U.S. at 653. That same result should occur here.

CONCLUSION

For the reasons set forth above and in the petitioner's brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

MARCIA D. GREENBERGER
EMILY J. MARTIN
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W.
Suite 800
Washington, DC 20036
emartin@nwlc.org
(202) 588-5180

Counsel for Amici Curiae

DEANNE E. MAYNARD
BRIAN R. MATSUI
Counsel of Record
SETH M. GALANTER
KAREN E. ESCALANTE
KLINTON S. MIYAO
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
bmatsui@mofo.com
(202) 887-8784

Counsel for National Women's Law Center

JUNE 25, 2010

APPENDIX A

The **Asian American Legal Defense and Education Fund** (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The provision at issue in this case discriminates on the basis of sex and acts to deny citizenship to many children.

The **California Women's Law Center** (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women.

Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. *Flores-Villar v. United States* raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in the *Flores-Villar* case.

The **Center for Family Policy and Practice** (CFFPP) was established in 1995. It is a nationally-focused, nonprofit, public policy organization that focuses on the impact of national and state welfare,

fatherhood, and child support policy on parents and their children who navigate the family law and social welfare systems without legal representation. Because of the limited advocacy and policy analysis with regard to these issues from the perspective of very low-income men of color, our mission has been to concentrate on that perspective, and to provide public education and information as to the concerns on these individuals and their families. CFFPP has tax-exempt status under federal and state laws.

The **Center on Children and Families** (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The **Clearinghouse on Women's Issues** (CWI) presents expert speakers on current topics which impact the lives of women, particularly public policies that affect women economically, educationally, medically

and legally. We also cooperate and exchange information with other organizations that work to improve the status of women, nationally and internationally.

The **Feminist Majority Foundation** (FMF), founded in 1987, is the nation's largest feminist research and action organization dedicated to women's equality, reproductive rights and health, nonviolence and equal educational opportunities. Our programs focus on advancing the legal, social and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and cultivation programs. It is important to our goal of equality between women and men that sex stereotypes not be used as a basis for decisions regarding the citizenship of a child whose father is a U.S. citizen.

Legal Momentum (formerly NOW Legal Defense and Education Fund), is the nation's oldest women's legal rights organization. Throughout its 40-year history, Legal Momentum has advocated in the courts and with federal, state, and local policymakers, as well as with schools, unions and private business, to secure equality and justice for women across the country. Legal Momentum has appeared before the Court in numerous equal protection cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in

Nguyen v. INS, 533 U.S. 53 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998), and as amicus curiae in *United States v. Virginia*, 518 U.S. 515 (1996), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

Legal Voice (formerly the Northwest Women's Law Center) is a nonprofit organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and securing equal rights for women and their families. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases advancing fair and equitable treatment of diverse families and establishing women's and girls' rights to equal protection under the law. Legal Voice continues to serve as a regional expert and leading advocate in litigation and in legislative efforts on a variety of gender-related issues.

Founded in 1980, the mission of the **National Association of Nurse Practitioners in Women's Heath** (NPWH) is to assure the provision of quality health care to women of all ages by nurse practitioners.

NPWH defines quality health care to be inclusive of an individual's physical, emotional, and spiritual needs. NPWH recognizes and respects women as

decision-makers for their health care. NPWH's mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

NPWH's interest in this case concerns our acknowledgment of the diversity of family units. That, in fact, many family units and parent and child relationships are not always based on a traditionally married couple. Further, that stereotypes should not be used as standards to judge a family unit or a relationship between a child and his or her parents.

The **National Congress of Black Women** represents thousands of Black women around the country. We have an interest in the outcome of this case (*Flores-Villar v. United States*) so that we can properly represent women who might find themselves in the position of being discriminated against based upon their gender.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work for "comprehensive, humane, and equitable immigration and naturalization laws, policies and practices that

facilitate and expedite legal status for more individuals" and our Principles state that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with our Principles and Resolutions, NCJW joins this brief.

The **National Council of Women's Organizations** is a nonprofit, nonpartisan coalition of more than 230 progressive women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to health and insurance challenges. Among our many member organizations that fight for and count on Title IX are the American Association of University Women, National Women's Law Center, Center for Women Policy Studies, Black Women United for Action, Digital Sisters, Inc., Feminist Majority Foundation, Girls Incorporated, National Women's Studies Association, Public Leadership Education Network, Women in Government, Women's Sports Foundation, Women's Edge Coalition, and Wider Opportunities for Women.

The **National Latino Fatherhood and Family Institute** (NLFFI) is a registered 501(c)(3) whose goals are to address the multifaceted needs of Latino men and fathers, foster a positive approach to working with Latino families, and build on the strengths of familiar and cultural traditions. In doing so, NLFFI believes that our children and nation will prosper and come closer to reaching its fullest potential. Inherent in these goals is a desire for equal and equitable treatment of both mothers and fathers so that families can remain strong and children can enjoy the benefits of two engaged, present, and loving parents.

The **National Organization for Women (NOW) Foundation** is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with hundreds of thousands of members and contributing supporters in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included advocating for immigration rights and legal equality for both women and men regardless of marital status, among many other issues.

The **National Partnership for Women & Families** is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership

has a longstanding commitment to equal protection for women under the law. The National Partnership has devoted significant resources to combating sex discrimination and has filed numerous amicus curiae briefs in the federal circuit courts of appeals to ensure that gender-based distinctions are held to a heightened standard of scrutiny.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to ensure equal protection of the laws, particularly the due process clause of the Fifth Amendment.

The **Sargent Shriver National Center on Poverty Law** (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. The Shriver Center has a strong interest in the fair and equal application of our nation's laws and policies, including those related to immigration and citizenship; and the eradication of unfair and unjust interpretations that are based on gender stereotypes.

The **Southwest Women's Law Center** is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a nonprofit civil rights organization established to eradicate discrimination by enforcing federal and local civil rights laws. In the Committee's 40-year history, its attorneys have represented thousands of individuals discriminated against on the basis of gender, race, national origin, religion, disability and other protected categories, and in cases alleging discrimination in public accommodations, education, employment, housing and prisons. The Committee's cases range in size from individual cases to nationwide pattern and practice cases. From its extensive civil rights litigation history, the Committee has amassed expertise in the issues of law and procedure raised in the present matter.

The **Women & Politics Institute** at American University strives to close the gender gap in political leadership. We provide young women with academic

and practical training that encourages them to become involved in the political process and facilitate research that enhances our understanding of the challenges women face in the political arena. We strongly believe in working to discourage gender discrimination, promote gender equality, and level the playing field for women in all facets of society.

The **Women's Law Center of Maryland, Inc.** is a nonprofit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding family law, domestic violence, reproductive rights and employment law. Through its direct services, including the Multi-Ethnic Domestic Violence Project that provides legal representation for foreign-born victims of domestic violence, the Women's Law Center provides legal representation and advice that protects the safety and economic independence of women. The Women's Law Center's advocacy efforts promote policies that discourage discrimination and promote gender equality.

The **Women's Law Project (WLP)** is a private nonprofit law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP works to advance the legal and economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by the U.S. Constitution and civil

rights laws. Discrimination on the basis of gender stereotypes is unlawful and perpetuates discriminatory acts that harm families and society.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 25 2010
OFFICE OF THE CLERK

No. 09-5801

IN THE
Supreme Court of the United States

RUBEN FLORES-VILLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF PROFESSORS OF HISTORY, POLITICAL SCIENCE, AND LAW IN SUPPORT OF PETITIONER

LORELIE S. MASTERS
LINDSAY C. HARRISON
Counsel of Record
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
lharrison@jenner.com

Counsel for Amici Curiae

074 53

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I CONGRESSIONAL REGULATION OF INTERGENERATIONAL CITIZENSHIP TRANSMISSION HISTORICALLY PRIVILEGED MARRIED CITIZEN FATHERS' RIGHTS AND SEVERELY LIMITED THE CITIZENSHIP RIGHTS OF MARRIED CITIZEN MOTHERS 5

a The Rights of Married Citizen Fathers Under the Citizenship Laws 5

b The Rights of Married Citizen Mothers Under the Citizenship Laws 9

II SEX-BASED GENERALIZATIONS ANIMATED –AND CONTINUE TO ANIMATE– THE DISPARATE CITIZENSHIP RIGHTS OF UNMARRIED CITIZEN FATHERS AND MOTHERS 19

a Citizenship Transmission from Citizen Fathers to Nonmarital Children 20

b. Citizenship Transmission from Citizen Mothers to Nonmarital Children 27

CONCLUSION 37

APPENDIX - *AMICI CURIAE* PROFESSORS OF HISTORY, POLITICAL SCIENCE, AND LAW 1a

TABLE OF AUTHORITIES

CASES

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 5

Caban v. Mohammed, 441 U.S. 380 (1979) 26

Craig v. Boren, 429 U.S. 190 (1976) 3

Frontiero v. Richardson, 411 U.S. 677 (1973) 3

Guyer v. Smith, 22 Md. 239 (1864) 21

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 34

In re M ----, 4 I. & N. Dec. 440 (B.I.A. 1951) 25

Mackenzie v. Hare, 239 U.S. 299 (1915) 11

Mason ex rel Chen Suey v. Tillinghast, 26 F.2d 588 (1st Cir. 1928) 22

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 4

Ng Suey Hi v. Weedin, 21 F.2d 801 (9th Cir. 1927) 22

Nguyen v. INS, 533 U.S. 53 (2001) 3, 4

Pequignot v. City of Detroit, 16 F. 211 (C.C.E.D. Mich. 1883) 11

Reed v. Reed, 404 U.S. 71 (1971) 3

Shanks v. Dupont, 28 U.S. (3 Pet.) 242 (1830) 10

Trop v. Dulles, 356 U.S. 86 (1958) 34

United States v. Virginia, 518 U.S. 515 (1996) 3

Wright v. Wright, 2 Mass. 109 (1806) 28

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIX 8

8 U.S.C. § 1401 4

8 U.S.C. § 1401(g) 27

8 U.S.C. § 1401(a)(7) (1970) 26

8 U.S.C. § 1409 4

8 U.S.C. § 1409(a) 27

Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 ..... 6, 13, 21

Act of Feb. 10, 1855, ch. 71, 10 Stat. 604 ..... 6, 7, 13, 21

Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 ..... 6, 13, 21

Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 ..... 6, 13, 21

Act of Mar. 2, 1907, ch. 2534, 34 Stat. 1228 11

Act of May 24, 1934, ch. 344, 48 Stat. 797 ..... 14, 15, 16

Act of May 26, 1924, ch. 190, 43 Stat. 153 ..... 9, 13

Act of Nov. 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655 26

Act of Sept. 22, 1922, ch. 411, 42 Stat. 1022 ..... 9, 12, 13

Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 ..... 26, 30

Nationality Act of 1940, ch. 876, 54 Stat. 1137 ..... 15, 18, 25, 26, 29

LEGISLATIVE MATERIALS

American Citizenship Rights of Women: Hearing on S. 992, S. 2760, S. 3968, and S.4169, Before a Subcomm. of the S. Comm. on Immigration, 72d Cong. (1933)..... 12

Cong. Globe, 30th Cong. 1st Sess. 827 (1848)..... 7

Cong. Globe, 33d Cong., 1st Sess. 170 (1853) 7, 8

62 Cong. Rec. 9061 (1922)..... 12

78 Cong. Rec. 7357 (1934)..... 25

86 Cong. Rec. 11,945 (1940)..... 16, 17

H.R. 14,684, 71st Cong. (1930) 23

H.R. 5489, 72d Cong. (1931) 23

House Comm. on Immigration & Naturalization, 76th Cong., Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments (Comm. Print 1939)..... 22, 28, 30, 31, 32

Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the House Comm. on Immigration and Naturalization, 72d Cong. (1932)..... 14, 23, 24, 25, 31

Relating to the Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality, Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization, 73d Cong. (1933) 14

OTHER AUTHORITIES

Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641 (2005) 13

Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982) 9, 10

Horace Binney, *The Alienigenae of the United States*, 2 Am. L. Reg. 193 (1854) 6

Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) 22

Candice Lewis Bredbenner, *A Nationality of her Own: Women, Marriage, and the Law of Citizenship* (1998). 11, 12, 13, 25

Homer L. Calkin, *Women in American Foreign Affairs* (1977). 18

Richard H. Chused, *Married Women's Property Law: 1800 1850*, 71 Geo. L.J. 1359 (1983) 8

Kristin Collins, Note, *When Fathers' Rights Are Mothers Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1169 (2000) 23-24, 25

Comment, *The Expatriation Act of 1954*, 64 Yale L.J. 1164 (1955) 34

Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830 1934*, 103 Am. Hist. Rev. 1440 (1998) 5, 12

Cyclopedic Law Dictionary (3d ed. 1940) 16

Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985) 10, 20, 21, 28

Wilfrid Hooper, *Law of Illegitimacy* (1911) 20

Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 Am. J. Int'l L. 447 (1930) 33

2 James Kent, *Commentaries on American Law* (8th ed. 1854) 6, 7, 20

Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998) 13

Alice Kessler-Harris, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th-Century America* (2001) 18

Maximilian Koessler, *"Subject," "Citizen," "National," and "Permanent Allegiance,"* 56 Yale L.J. 58 (1946) 33-34

T.A. Larson, *Woman Suffrage in Western America*, 38 Utah Hist. Q. 8 (1970) 8

Letter from Assistant Secretary of State Wilbur J. Carr to the Chairman of the House Committee on Immigration and Naturalization, *reprinted in Relating to the Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality, Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization*, 73d Cong. (1933) 15

32 Op. Att'y Gen. 162 (1920) 22

39 Op. Att'y Gen. 290 (1939) 25, 28, 29

Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934) 25, 28

Restatement (Third) of Property (Wills and Other Donative Transfers) (1999) 26

Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 Pol. & Soc'y 1 (1984) 5-6, 12

Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934) 33, 34, 35, 36

Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073 (1994) 8

Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002) 5, 10

Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997) 7

Ellery C. Stowell, Book Review, 30 Am. J. Int'l L. 170 (1936) 33

William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, 45 Am. J. Int'l L. 476, (1951) 34

Frederick Van Dyne, *Citizenship of the United States* (1904) 28

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of history, political science, and law with particular expertise in the history of citizenship and gender. *Amici* have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the law of citizenship and the manner in which that law has been shaped and animated by sex-based stereotypes and outdated gender norms.

SUMMARY OF ARGUMENT

Sex-based laws premised on outdated or archaic presumptions about the proper roles of men and women run afoul of well-established constitutional principles, especially when such laws enforce gender-differentiated parental roles. *Amici* write to elaborate on the history of Congress's use of sex-based classifications in the regulation of citizenship. *Amici* demonstrate that, in its regulation of intergenerational and interspousal citizenship transmission, Congress has consistently relied on

---

1. The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

and perpetuated sex-based norms concerning proper parental roles, even when those norms have changed in other contexts and in social practice. As this brief shows, Congress's tendency to regulate citizenship law using anachronistic gender stereotypes is readily apparent in the statutes that govern the citizenship rights of parents of nonmarital foreign-born children.

Historically, the notion that the husband was the legal and political head of the marital family was the single most powerful belief to shape the United States' regulation of *jus sanguinis* citizenship. That principle has informed every aspect of the citizen transmission statutes, including the parental residency requirement at issue here. With respect to married citizen parents, the headship principle led to dramatic differences in the rights of citizen fathers versus mothers to confer citizenship on their foreign-born children. While married citizen fathers could transmit citizenship to their foreign-born children starting in 1790, it was nearly 150 years before Congress recognized the right of any married citizen mothers to do the same.

Outside the bonds of marriage, a mirror opposite pattern prevailed. According to powerful sex-based cultural assumptions, mothers bore full responsibility for children born out of wedlock; fathers played no role in rearing their nonmarital children. Based on these now-archaic assumptions, Congress substantially limited citizenship transmission between citizen fathers and their foreign-born nonmarital children in ways unrelated to the need to ascertain the existence of a biological or meaningful father-child relationship. These

limitations persist today. At the same time, Congress was—and continues to be—solicitous of the citizenship claims of nonmarital foreign-born children of citizen mothers.

The historical sources are brimming with evidence of the sex-based assumptions that have animated U.S. citizenship law and that continue to do so. By contrast, those sources contain little evidence that the minimal parental U.S. residency requirement for nonmarital foreign-born children of citizen mothers was predicated on a particular concern about the risk of statelessness for those children. Moreover, to the extent statelessness was a concern, Congress's response was itself shaped by preconceived notions about the respective roles of men and women in rearing their nonmarital children.

ARGUMENT

This Court has recognized time and again that laws that distinguish between men and women based on outdated understandings of their "respective roles" or "separate spheres" are contrary to constitutional gender-equality principles. *See United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). To be sure, this Court has by no means foreclosed the ability of legislatures to draw sex-based distinctions. *See, e.g., Nguyen v. INS*, 533 U.S. 53 (2001). But one undeniable theme of these decisions is that such distinctions are suspect

whenever they presume distinctive societal roles for the sexes, both vis-à-vis each other and vis-à-vis their children. *See, e.g.*, *id.* at 73; *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

In the decision below, the Court of Appeals concluded that the differential parental residency requirements contained in the citizenship statutes in question, 8 U.S.C. § 1401 and § 1409, do not rest on or perpetuate sex-based stereotypes. *Amici* respectfully disagree. A careful reconstruction of the history of U.S. citizenship law reveals the actual and archaic source of the statutory discrimination at issue. Especially with respect to nonmarital children, Congress has presumed that women are the primary caretakers of such children and that a child accordingly has a different and stronger bond with its mother than with its father. By codifying this and other sex-based assumptions into citizenship laws, Congress has persistently enforced stereotypical views about women as mothers, and men as fathers, long after such views have eroded in other areas of law and practice. *See, e.g.*, *Hibbs*, 538 U.S. at 731 (invalidating state laws attributable to the "pervasive sex-role stereotype that caring for family members is women's work").

I. CONGRESSIONAL REGULATION OF INTERGENERATIONAL CITIZENSHIP TRANSMISSION HISTORICALLY PRIVILEGED MARRIED CITIZEN FATHERS' RIGHTS AND SEVERELY LIMITED THE CITIZENSHIP RIGHTS OF MARRIED CITIZEN MOTHERS.

a. The Rights of Married Citizen Fathers Under the Citizenship Laws

Historically, the husband's position as "head of the household" enhanced men's cultural, political, and legal authority in myriad contexts beyond the household itself.[2] Citizenship law was no exception. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 Am. Hist. Rev. 1440, 1452 (1998); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration*

---

2. *See generally Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("[T]he civil law . . . has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state."); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981-87, 993-97, 1019-22 (2002) [hereinafter Siegel *She the People*] (explaining that the husband's authority in the household provided a foundation for men's civic participation as voters, jurors, and office holders, and a justification for women's exclusion from those activities).

and Naturalization Policies in the United States, 13 Pol. & Soc'y 1, 11 (1984). Accordingly, the laws governing *jus sanguinis* citizenship privileged the father as the source of citizenship for foreign-born children from 1790, when the first citizenship statute was enacted, until 1934. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 ("Act of 1855"); Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104. The male headship principle was so powerful that even ambiguous statutory language in the citizenship statutes of 1790, 1795, and 1802—which referred only to transmission of citizenship to "children of citizens" or "persons"—was generally understood to mean the children of citizen fathers. *See* 2 James Kent, *Commentaries on American Law* *53 (8th ed. 1854).[3]

---

3. It was possible to interpret the early citizenship transmission statutes more restrictively to mean that only foreign-born children of two citizen parents would acquire citizenship. *See* 2 Kent, *supra*, *53; *see also* Horace Binney, *The Alienigenae of the United States*, 2 Am. L. Reg. 193, 207 (1854). However, as Kent observed, the understanding that citizen fathers could convey citizenship to their foreign-born children regardless of the mother's citizenship was consistent with the requirement in all of the early citizenship statutes that "the right of citizenship shall not descend to persons whose fathers have never resided within the United States." Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; *see also* Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104; 2 Kent, *supra*, *53. That interpretation was also consistent with English law on

In the mid-nineteenth century, Congress considered a proposal to repudiate the sex bias in the early *jus sanguinis* citizenship statutes. *See* Cong. Globe, 30th Cong. 1st Sess. 827 (1848) (statement of Sen. Webster) (proposing a bill to confer citizenship on all foreign-born children "of a father or mother being or having been a natural born citizen of the United States"). Instead, in 1855 Congress affirmed the husband-favoring interpretation. Rewording the statute to clarify that only children "whose *fathers* were or shall be at the time of their birth citizens of the United States, shall be deemed . . . citizens of the United States," Act of 1855, § 1, 10 Stat. at 604 (emphasis added), Congress codified in citizenship law the well-established norm of male headship of the marital family. *See* Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 234-35 (1997) (noting that the 1855 Act was "true to the law's pervasive patriarchalism").

In keeping with social and legal norms privileging the father as the source of citizenship for dependents in the marital household, Congress also pronounced in 1855 that a non-citizen woman would become an American citizen simply by marrying an American man. Act of 1855, § 2, 10 Stat. at 604. A primary advocate of this change, Representative Cutting of New York, justified it in terms of the "merger" doctrine: "[B]y the act of marriage itself the political character of the wife shall at once conform to the political character of the husband." Cong. Globe, 33d

---

the point. *See* 2 Kent, *supra*, *51 (citing 4 Geo. 2, ch. 21 (1731)).

Cong., 1st Sess. 170 (1853) (statement of Rep. Cutting). Cutting assured his fellow congressmen that "there can be no objection to" such a law "because women possess no political rights" of their own. *Id.*

Congress continued to shape the laws governing intergenerational and interspousal citizenship transmission according to the principle of male headship even as the social and legal foundations of that principle began to erode.[4] Thus, when Congress enacted the Cable Act of 1922, eliminating the American man's absolute privilege to endow his foreign wife with citizenship simply by marrying her, it continued to reify the male headship principle in citizenship law in other ways. Congress expedited the naturalization process for foreign wives of

---

4. In the late nineteenth and early twentieth centuries, laws giving husbands power over their wives' legal and economic personae were gradually revised by state legislatures and courts under pressure from advocates. In the 1840s and 1850s, states began to pass married women's property acts, allowing women to retain some control over their separate property obtained before marriage, and, slightly later, statutes affording wives the right to their own earnings. *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359, 1398-1401 (1983); Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073, 1083 (1994). During this period, women began to obtain public law rights as well, including the right to vote. *See* T.A. Larson, *Woman Suffrage in Western America*, 38 Utah Hist. Q. 8, 19 (1970); U.S. Const. amend. XIX.

American citizens, Act of Sept. 22, 1922 (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022, exempted men's foreign wives from racial quotas, and otherwise gave them preferential immigration status. Act of May 26, 1924, ch. 190, §§ 4(a), 4(d), 13(c), 43 Stat. 153, 155, 162. As discussed below, the American woman who married a foreign husband never received such preferential treatment; instead, for many decades she would be expatriated for marrying a foreigner. *See infra* at 10-13.

In short, the law governing citizenship transmission reflected and perpetuated prevailing social and legal norms that secured men's place as head of the marital family and household. Well into the twentieth century, national legislators presumed that the husband determined the political and cultural character of his dependents—wife and children included—and, hence, that the dependents' citizenship should conform to his. Even in the face of significant changes in married women's legal status, these presumptions continued to inform citizenship law until they were gradually and imperfectly dislodged.

b. The Rights of Married Citizen Mothers Under the Citizenship Laws

The same norms that informed married fathers' power to transmit citizenship to their foreign-born children conversely led to substantial limitations on the citizenship rights of married mothers. Under the doctrine of coverture, wives had no independent civil or legal identity—they were "dead" in the eyes of the law. *See* Norma Basch, *In the Eyes of the Law:*

Women, Marriage, and Property in Nineteenth-Century New York 50-55 (1982). A wife's legal and political identity was subsumed into that of her husband. That principle was pervasive, shaping the political and legal rights of women—married and unmarried—and the social expectations imposed upon them.[5]

Even as these powerful social and legal norms were challenged and lost hold in other areas of law, *see supra* note 4, they continued to inform Congress's restriction of married women's citizenship rights. Three examples are especially germane.

First, the principle of male headship was integrated into American citizenship law through the expatriation of American women who married non-citizen husbands. This had not been the common law practice. *See Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) (Story, J.) ("[M]arriage with an alien,

---

5. Because it was assumed that a married woman operated under her husband's influence and lacked independent will, married women could neither execute contracts nor file suit to defend their rights and property without their husbands' official participation in the lawsuit. *See* Basch, *supra*, 51. Similar logic deprived all women of the vote and barred them from jury service and office holding, even if they were unmarried. *See* Siegel, *She the People*, 981-86, 993-97. Under the strict common law, a married woman also lacked the right to custody of her children in the event of separation from or death of the husband—a limitation that changed slowly in the nineteenth century. *See* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 235 (1985).

whether a friend or an enemy, produces no dissolution of the native allegiance of the wife."); Candice Lewis Bredbenner, *A Nationality of her Own: Women, Marriage, and the Law of Citizenship* 59 (1998). In the late nineteenth century, however, some courts began expatriating American women who married non-citizens. Thus, in 1883 a federal court held that an American woman lost her citizenship upon marriage to a non-citizen, declaring that "legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative." *Pequignot v. City of Detroit*, 16 F. 211, 216 (C.C.E.D. Mich. 1883).

Consistent with its tendency to enhance, rather than minimize, the sex-discriminatory function of the citizenship laws, Congress codified the *Pequignot* holding in the Expatriation Act of 1907, which stipulated that "any American woman who marries a foreigner shall take the nationality of her husband." Act of Mar. 2, 1907 (Expatriation Act), ch. 2534, § 3, 34 Stat. 1228, 1228. Affirming the constitutionality of that Act eight years later, this Court observed that "[t]he identity of the husband and wife is an ancient principle of our jurisprudence [which] worked in many instances for her protection [and which] give[s] dominance to the husband." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915). As Senator Cable later explained, "for centuries male legislatures and jurists" used America's "grossly unjust" citizenship laws to "jealously preserve[] the husband's dominance and . . . limit[] the wife to a negligible sphere of activity and assign[] her to an

inconspicuous position in the eyes of the law." *American Citizenship Rights of Women: Hearing on S. 992, S. 2760, S. 3968, and S. 4169 Before a Subcomm. of the S. Comm. on Immigration*, 72d Cong. 25 (1933).

After the ratification of the Nineteenth Amendment in 1920, women's opposition to the Expatriation Act gained force. *See* Bredbenner, *supra*, 81; Cott, 103 Am. Hist. Rev. at 1464; Sapiro, 13 Pol. & Soc'y at 13. But not all agreed that women's suffrage paved the way for equal citizenship rights. Resistance was predicated on a persistent valuing of male headship and "marital unity," which presupposed that a wife must and would conform to the cultural and political character of the husband. *See* 62 Cong. Rec. 9061 (1922) (statement of Rep. Mills) (by allowing American women to retain their citizenship upon marriage to a non-citizen, "you violate . . . the existing legal principle of family unity.").

In 1922, Congress enacted the Cable Act, which ended the automatic expatriation of some, but not all, American women who married non-citizens. Cable Act, ch. 411, § 3, 42 Stat. at 1022. Congress's equalization of women's citizenship through the Cable Act was equivocal. The law continued to expatriate any American woman who married a non-citizen and resided in her husband's country for two years, or abroad in any other country for five years. *Id.* No such limitation has ever applied to an American man who opted to live abroad with his non-citizen wife. Moreover, the Cable Act's sex-equality principle did not extend to those women

whose foreign husbands were themselves "ineligible to citizenship" under our naturalization laws. *Id.* §§ 3, 5, 42 Stat. at 1022; *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 662, 694 n.335 (2005). Thus, under the Cable Act the American woman who married a racially ineligible non-citizen was still expatriated. *See* Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 42-43 (1998). No such draconian penalty was visited upon an American man who did the same. *See* Act of May 26, 1924, ch. 190, §§ 4(a), 4(d), 13(c), 43 Stat. 153, 155, 162.

Second, until 1934 the male headship principle also prevented recognition of married American women's capacity to transmit citizenship to their foreign-born children. *See* Bredbenner, *supra*, 84. As discussed above, prior to 1855, the citizenship statutes were interpreted to preclude transmission of citizenship from the married American mother to her foreign-born children. *See* Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104; *see also supra* at 6. Congress affirmed and codified that interpretation in the citizenship statute enacted in 1855. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

Even after the enactment of the Cable Act in 1922, married women were unable to transmit citizenship to their foreign-born children. Strong resistance to equalization of that right was premised largely on the belief that the husband determined

the political and cultural character of the family. *See Relating to Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, and Relating to the Removal of Certain Distinctions in Matters of Nationality: Hearings on H.R. 5489 Before the H. Comm. on Immigration and Naturalization*, 72d Cong. 18 (1932) [hereinafter Hearings on H.R. 5489] (Statement of Sen. Green) ("I am still constrained to believe that the man is the head of the family."); *Relating to the Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality, Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization*, 73d Cong. 29 (1933) [hereinafter Hearings on H.R. 3673] (statement of Lieut. Col. Fred B. Ryons) (objecting to citizenship transmission by married mothers on the ground that "[t]he head of the family . . . has a perfect right and has an obligation as the head of the family to rule his family"). It was not until 1934 that Congress finally recognized the right of American wives to transmit citizenship to their foreign-born children. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797.

Third, even after Congress introduced formal statutory equality with respect to wives' ability to transmit citizenship to their foreign-born children, beliefs about married women's lack of authority and individual identity within marriage continued to shape the citizenship laws in significant ways. Indeed, the equalization of the law regarding

married mothers' and fathers' right to transmit citizenship in 1934 prompted Congress to introduce a child U.S. residency requirement, *see* Act of May 24, 1934, ch. 344, § 1, 48 Stat. at 797, and a lengthy age-delimited parental U.S. residency requirement for children of mixed-nationality couples, *see* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1138-40; *see also supra* note 3 (noting minimal U.S. residency requirement for fathers prior to 1934).

Although sex-neutral in their wording, the child and parental U.S. residency requirements were not sex-neutral in their origins or statutory design. Repeatedly in the debates over the 1934 and 1940 acts, legislators and witnesses articulated a concern that the foreign-born children of American women in mixed-nationality marriages would not be "American" in character because the foreign husband would establish the character of his dependents. In 1933, an Assistant Secretary of State articulated this shared understanding: "It is hardly necessary to say that, when a woman having American nationality marries a man having the nationality of a foreign country and establishes her home with him in his country, the national character of that country is likely to be stamped upon the children, so that from the standpoint of the United States they are essentially alien in character." *See* Letter from Assistant Secretary of State Wilbur J. Carr to the Chairman of the House Committee on Immigration and Naturalization, *reprinted in* Hearings on H.R. 3673 at 9.

The belief that the wife and children conformed to the foreign husband's cultural practices and political

views first led to the inclusion of a five-year age-delimited child U.S. residency requirement in the 1934 Act. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. at 797. A 1938 letter by a cabinet-level committee appointed by President Roosevelt explained this series of events:

> Congress apparently took into consideration the fact that persons born in foreign countries whose *fathers* were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States, and consequently annexed as a condition for retaining citizenship a 5-year period of residence [for the child] in this country between the ages of 13 and 18.

86 Cong. Rec. 11,945 (1940) (letter dated June 1, 1938 from Sec. of State Cordell Hull, Att'y Gen. Homer Cummings, and Sec. of Labor Frances Perkins) (emphasis added).

After the 1934 Act went into effect, however, there was concern that the child residency requirement improperly limited transmission of citizenship to the foreign-born children of American citizen fathers who were married to non-citizens. Such children were believed to conform to the cultural and political character of the American "head of the family"—a legal term of art that, in this period, referred to the husband/father.[6] The same

---

6. *See, e.g.*, *Cyclopedic Law Dictionary* 522 (3d ed. 1940) (defining "head of a family" in terms of the

cabinet-level committee explained that "these [child] residence requirements will impose great hardship in some cases," especially where the "head of the family" worked abroad for the American government or an American enterprise of some sort. *Id.* Thus, it recommended an exemption from the child residency requirement in such cases. The committee also recommended the imposition of a new requirement that the citizen parent in a mixed-nationality marriage "should have resided at least 10 years in the United States prior to the birth of the child," which, again, would not apply to those foreign-born children of families where the "head of the family" was an American citizen employed by an American enterprise. *Id.*

As a consequence of these sex-based assumptions about parental roles in marriage, in 1940 Congress re-configured the citizenship transmission statute in a manner that would help preserve husbands' power and privilege while disproportionately constraining married women's ability to transmit citizenship to their foreign-born children. The resulting exception to the residency requirements was phrased to relieve the children of citizen *fathers* from the onerous child and parental residency requirements, while severely diminishing the likelihood that the children of citizen *mothers* would benefit from it. The exception was triggered only when the citizen parent "*at the time of the child's birth* [was] residing abroad *solely or principally in the employment* of the Government of

---

relationship between "father and child" or "husband and wife").

the United States or a bona fide American . . . organization . . . for which *he* receives substantial compensation." Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. at 1139 (emphasis added). In the 1940s, married women with children were rarely engaged in such employment, especially not "at the time of [her] child's birth," and hence the exception was of little use to citizen mothers.[7] Even the details of the parental residency requirement thus evince the imprint of the male headship principle and the corresponding belief that the wife and children conformed to the cultural and political character of the husband.

In short, the profound limitations on the citizenship rights of married women—including their right to transmit citizenship to their foreign-born children—were corollaries to the sex-differentiated norm that empowered married men to transmit citizenship to their wives and foreign-born children. Congress's regulation of *jus sanguinis* and derivative citizenship not only reflected those sex-based norms, but extended their vitality in citizenship law even as

---

7. Women seeking employment abroad as Foreign Service officers faced almost insurmountable sex discrimination. *See* Homer L. Calkin, *Women in American Foreign Affairs* 102-103, 110 (1977). Moreover, in the mid-twentieth century, working women were often lawfully dismissed during pregnancy, and few had access to maternity leave or job security after the birth of a child. *See* Alice Kessler-Harris, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th-Century America* 210-11 (2001).

similar sex-based distinctions were eroding in other contexts.

II. SEX-BASED GENERALIZATIONS ANIMATED—AND CONTINUE TO ANIMATE—THE DISPARATE CITIZENSHIP RIGHTS OF UNMARRIED CITIZEN FATHERS AND MOTHERS.

Outside the bonds of marriage, a mirror-opposite pattern of sex-based regulation of *jus sanguinis* citizenship prevailed. Courts, administrators, and Congress have readily recognized citizenship claims of the foreign-born children of unmarried citizen mothers, and Congress imposed only a minimal parental residency requirement in such cases. By contrast, transmission of citizenship between fathers and their nonmarital foreign-born children was, and is, severely limited.

At first glance, this system may appear to be in tension with the male-privileging norm that operated in the marital context, but the two systems were shaped by the same constellation of sex-based social norms. The man's headship over his marital family was a right and privilege linked to his control over and responsibilities for his dependents. But the man who fathered a child outside of marriage was presumed to have no relationship with or responsibility for his child. Meanwhile, the woman who had a child out of wedlock experienced the social ignominy of and bore full responsibility for the child.

Through its regulation of *jus sanguinis* citizenship, Congress reinforced and perpetuated these gendered norms regarding men's and women's

respective roles and responsibilities as parents outside marriage. By codifying a system of citizenship laws that enforced sex-differentiated family roles, Congress constrained individual mothers' and fathers' ability to decide how to perform their roles as parents. The statutory provision at issue in this case continues this transparently sex-discriminatory means of regulating citizenship transmission, even as the social and legal norms regarding nonmarital parenthood have evolved.

a. Citizenship Transmission from Citizen Fathers to Nonmarital Children

Premised on the outdated view that fathers have only attenuated relationships with their nonmarital children and that the government should recognize such relationships only in extremely limited circumstances, U.S. citizenship laws have consistently encumbered citizenship transmission from citizen fathers to their nonmarital children.

For much of the nineteenth and early twentieth centuries, domestic relations laws generally insulated men from their nonmarital children by disfavoring those children's claims to property and status, even when the children had been legitimated. *See* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 221-22, 232-33 (1985).[8] Well into the early twentieth

---

8. Under the common law, a nonmarital child was *nullius filius*. The law did not recognize a legal relationship between the child and either of his parents. *See* 2 Kent, *supra*, *212; *see also* Wilfrid Hooper, *The Law of Illegitimacy* 25, 122, 135 (1911) (the nonmarital child

century, domestic relations laws in most states resisted recognition of the father-child relationship outside of marriage and demonstrated solicitousness for putative fathers who wished to avoid their parental responsibilities. *See id.* at 199, 217, 231-32. These laws both evinced and perpetuated powerful cultural resistance to men's responsibility for—and relationships with—their nonmarital children.

Such resistance also shaped the regulation of *jus sanguinis* citizenship, even before Congress first addressed the citizenship status of foreign-born nonmarital children in 1940. From 1790 until 1940, the citizenship statutes were silent as to the marital status of the citizen parent. *See* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104. Nevertheless, these statutes were interpreted to allow transmission of citizenship to the marital children of citizen fathers, but not to their illegitimate children. The lead nineteenth-century case in this area, *Guyer v. Smith*, 22 Md. 239 (1864), demonstrates just how rigid this limitation was. In *Guyer*, the father had recognized his children, given them his name, and named them in his will. Yet the court refused to recognize their claims to legitimacy, and thus to citizenship. *See Guyer*, 22 Md. at 249 (finding that the citizen father's children were "illegitimate; under our law *nullius*

---

had no right to inherit, no right to the surname of either parent, and no claim on them for support or education).

filii, and clearly therefore not within the provisions of the [1802] Act").

Courts and administrators gradually recognized the citizenship claims of at least some nonmarital foreign-born children who had been legitimated by the citizen father. *See* 32 Op. Att'y Gen. 162, 164-65 (1920); House Comm. on Immigration & Naturalization, 76th Cong., Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments 17 (Comm. Print 1939) [hereinafter Proposed Code]. But the legitimation exception was narrow and uncertain, with courts and administrators erecting a high bar when assessing citizenship claims asserted by or on behalf of the nonmarital children of citizen fathers. *See, e.g.*, *Mason ex rel Chen Suey v. Tillinghast*, 26 F.2d 588 (1st Cir. 1928) (affirming rejection of evidence of legitimation for purposes of determining citizenship of foreign-born nonmarital child of American father); *Ng Suey Hi v. Weedin*, 21 F.2d 801, 802 (9th Cir. 1927) (holding that "illegitimate children, born abroad of citizens, being nullius filii" are not citizens under the citizenship statute, and rejecting evidence of legitimation by American father); Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612 (1915) ("[I]t seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.").

In 1934, Congress had the opportunity to introduce sex equality into the laws governing *jus sanguinis* citizenship for nonmarital children, but it

refused to do so. The sex-based understanding that that men played an attenuated and discretionary role in the lives of their nonmarital children provided crucial context for the legislative debates over citizenship transmission to such children. Bills introduced in the early 1930s would have secured parental sex equality with respect to transmission of citizenship to foreign-born children of citizen parents, regardless of the parents' marital status:

> Any child, *whether legitimate or illegitimate*, born out of the limits and jurisdiction of the United States, whose father or mother may be at the time of the birth of such child a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any child whose father or mother had never resided in the United States previous to the birth of such child.

H.R. 14,684, 71st Cong. § 3 (1930) (emphasis added); *see also* H.R. 5489, 72d Cong. (1931).

Supporters of this bill urged that equal treatment of the citizen mothers and fathers of nonmarital foreign-born children was warranted pursuant to the sex-equality principles that informed the 1922 Cable Act. This included the principle that mothers and fathers should have equal rights to confer citizenship to their nonmarital children, and equal responsibility for such children. *See* Hearings on H.R. 5489 at 3-5. (Statement of Burnita Shelton Matthews); *id.* at 17-19 (Statement of Laura Berrien); *see also* Kristin

Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669, 1693-98 (2000).

Importantly, the proponents of sex equality in citizenship laws were aware that, in the context of the nonmarital child, proof of paternity would be required. They stressed that procedures would have to be adopted in order to ensure that the child was, indeed, the child of the citizen father. *See* Hearings on H.R. 5489 at 6 (Statement of Burnita Shelton Matthews) ("We may rest assured, it seems to me, that adequate proof is required before the right to the protection of the country is afforded. It is unlikely that any person entitled to protection under this bill would get it unless proof were conclusive."). But, beyond that, they sought equal treatment of mothers and fathers in the transmission of citizenship to nonmarital foreign-born children. *Id.* at 3-5, 17-18.

Nevertheless, opponents resisted sex-equality in the regulation of *jus sanguinis* citizenship of nonmarital foreign-born children not primarily because they were worried about fraud, but because it offended the deeply-held view that the law did not—and should not—recognize the relationship of the father and his nonmarital child. As one congressman explained in an exchange with a proponent of the bill: "The child cannot inherit. It would not do, if he could. You are trying to undo what practically all of the big States in the country have held to be the proper procedure (to give to this child consideration) but you are giving an illegitimate child consideration." Hearings on H.R.

5489 at 5 (statement of Rep. Jenkins). These concerns, as well as stubborn resistance to full gender equality in matters relating to citizenship, were fatal to the inclusion of "illegitimate" in the bill. *See* Bredbenner, *supra*, 230-31; Collins, 109 Yale L.J. at 1697. As a consequence, when Congress in 1934 passed a statute enabling married mothers to transmit citizenship to their foreign-born children, the final version of the bill said nothing concerning parental marital status, but was understood to apply to the foreign-born children of married citizen parents only. *See* 78 Cong. Rec. 7357 (1934) ("[This bill] applies to the children of wives and the children of husbands.") (statement of Rep. Jenkins); 39 Op. Att'y Gen. 290, 291 (1939) (recognizing "that the applicable statutory provisions [in the citizenship laws] apply only to legitimate children").[9]

Six years later, Congress finally addressed the citizenship status of foreign-born nonmarital children, making explicit what had been understood for decades: American citizenship law would continue to distance fathers from their nonmarital children. *See* Nationality Act of 1940, ch. 876, §§ 201(g) & 205, 54 Stat. 1137, 1138-40. The Nationality Act of 1940 codified and carried forward many of the pre-existing practices of courts and administrators. But it also extended the law's sex-

---

9. Some sources suggested that the 1934 Act provided statutory authority for transmission of citizenship to the foreign-born nonmarital child of a citizen *mother*. *See In re M-----*, 4 I. & N. Dec. 440 (B.I.A. 1951); Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934).

based differential treatment of citizen parents by imposing new limitations on transmission of citizenship from citizen fathers to nonmarital foreign-born children through a host of requirements that did not apply to citizen mothers: mandatory legitimation during the child's minority; a ten-year, age-delimited U.S. residency requirement for the father; and a five-year, age-delimited U.S. residency requirement for the child. *Id.*

In 1952, Congress essentially re-codified this system, including the ten-year age-delimited parental residency requirement that applied to citizen fathers of foreign-born nonmarital children, but not to citizen mothers of such children. *See* Immigration and Nationality Act of 1952, ch. 477, §§ 301(a)(7) & 309, 66 Stat. 163, 236-38. It was the 1952 version of this statute that was in effect in 1974 when Petitioner was born. *See* 8 U.S.C. § 1401(a)(7) (1970). Congress has re-codified this basic statute with minor changes on several occasions since then. *See, e.g.*, Act of Nov. 14, 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. But despite advances in legal norms regarding fathers' rights and responsibilities with respect to their nonmarital children,[10] Congress continues to impose a

---

10. *See, e.g., Restatement 3d Property (Wills and Other Donative Transfers)* § 2.5 (1999) ("For purposes of intestate succession by, from, or through an individual . . . [a]n individual is the child of his or her genetic parents, whether or not they are married to each other . . . ."); *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979) (prohibiting state from distinguishing between unwed

significantly longer residency requirement on citizen fathers of nonmarital children—even where, as here, the father has legitimated the child and has raised him in his American home. *See* 8 U.S.C. §§ 1401(g) & 1409(a) (requiring that fathers of nonmarital foreign-born children satisfy a five-year age-delimited U.S. residency requirement).

In short, consistent with its long-standing tendency, Congress has codified particular and anachronistic sex-based norms concerning father-child relations in the laws governing citizenship transmission to nonmarital foreign-born children. It has done so notwithstanding the erosion of these norms in other areas of law and in individual mothers' and fathers' everyday practices as parents.

b. Citizenship Transmission from Citizen Mothers to Nonmarital Children

The United States has been far more solicitous of the citizenship claims of foreign-born nonmarital children of citizen mothers than it has of claims of the nonmarital foreign-born children of citizen fathers. As a general matter, all three branches of the U.S. government have consistently recognized the mother as a source of citizenship for nonmarital, foreign-born children. The ready recognition of the mother-child relationship reflects the sex-based assumption that the mother, but not the father,

---

mothers and fathers solely on the basis of sex where the father maintains a parent-child relationship).

bears the rights and responsibility of unwed parenthood.[11]

Officials administering the citizenship laws generally recognized the citizenship claims of foreign-born nonmarital children of citizen mothers long before Congress regulated the subject. *See, e.g.*, Proposed Code at 18 (noting that "the Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother"); Frederick Van Dyne, *Citizenship of the United States* 49 (1904); Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. Chi. L. Rev. 99, 105 (1934) (citing a State Department memo of October 27, 1932).[12] A 1939

---

11. In a departure from the strict common law principle of *nullius filius*, judges and legislators in both England and America gradually began to acknowledge the mother-child relationship outside marriage so as to ensure a responsible care provider and source of material support. *See Wright v. Wright*, 2 Mass. 109, 111 (1806) (Parsons, C.J.) ("[T]o provide for [the bastard's] support and education, the mother has a right to the custody and control of him, and is bound to maintain him, as his natural guardian."). As a consequence, by the early twentieth-century, many of the limitations on the legal relationship between the nonmarital child and his mother had been repealed. Grossberg, *supra*, 224-25. These changes corresponded with a growing consensus that the mother was the natural and presumed caretaker of her children—a cultural norm that strengthened mothers' legal custodial rights both in and out of marriage. *Id.* at 209, 225, 234-35.

12. *But see* 39 Op. Att'y Gen. 290, 290-91 (1939) (acknowledging that nonmarital children of citizen

House Committee report acknowledged this practice and explained that it made sense in a social and legal environment in which, outside marriage, the mother "stands in the place of the father." Proposed Code at 18. That often-used phrase functioned as a reference to the mother's superior parental rights and responsibilities with respect to her nonmarital children, and also reflected a social and cultural belief that mothers, not fathers, sustained relationships with nonmarital children. Hence, a 1939 Attorney General Opinion notes that the exclusion of such children from the United States would be "not only harsh, but largely impractical." 39 Op. Att'y Gen. at 291.

In 1940, Congress codified the administrative practice of maternal transmission of citizenship to nonmarital foreign-born children. Section 205 of the Nationality Act of 1940 provided that if the "mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions," the child "shall be held to have acquired at birth her nationality status." *See* Nationality Act of 1940, ch. 876, § 205, 54 Stat. at 1139-40. Thus, unlike the transmission of citizenship to the nonmarital foreign-born children of citizen fathers, citizenship transmission between the citizen mother and

---

mothers have been recognized as citizens, but finding that such children do not fall within the text of existing legislation and that "resort to the Congress for additional legislation is desirable").

nonmarital child was largely unencumbered.[13] Citizen mothers who wished—or wish—to secure citizenship for their nonmarital foreign-born children have never been required to provide proof of maternity, pledge support for their minor children, satisfy a child residency requirement, or satisfy a lengthy age-delimited parental U.S. residency requirement of the sort at issue in this case.[14]

The historical sources make clear that Congress's solicitude for the nonmarital foreign-born children of citizen mothers had three primary motivations. *First*, in 1940 Congress was engaged in a massive overhaul of the country's nationality laws, and it sought to standardize numerous administrative practices that had not yet been codified. During this process, Congress was aware of the State Department's recognition of the citizenship of nonmarital foreign-born children of American mothers. *See* Proposed Code, *supra*, 18. Congress

---

13. Indeed, the primary statutory limitation on transmission of citizenship between American mothers and their nonmarital foreign-born children contained in the Nationality Act of 1940—that the child would take the citizenship of her American mother only "in the absence of . . . legitimation" by the father—was deleted in the recodification of the provision in the Immigration and Naturalization Act of 1952. *See* Immigration and Nationality Act of 1952, ch. 477, § 309, 66 Stat. at 238-39.

14. In 1952, Congress strengthened the parental residency requirement applicable to citizen mothers of foreign-born nonmarital children, increasing it to one year. *See* Immigration and Nationality Act of 1952, ch. 477, § 309(c), 66 Stat. at 238-39.

thus codified this long-standing, sex-based, extra-statutory practice.

Second, ready recognition of the mother as the source of *jus sanguinis* citizenship for nonmarital children was consistent with the sex-based presumption that mothers, not fathers, were the caretakers of nonmarital children. Legislators who, as discussed above, were hostile toward proposals to recognize citizenship claims of citizen fathers' nonmarital foreign-born children characterized the State Department's recognition of nonmarital foreign-born children of citizen mothers "as a great boon" for the "unfortunate" mother. Hearings on H.R. 5489 at 5 (statement of Rep. Jenkins).

Third, at a time when nations around the globe were engaged in a concerted effort to rationalize the laws governing citizenship and nationality, the legislators and their advisors were mindful of the sex-based laws and policies of other countries on the question of *jus sanguinis* citizenship of all children, including nonmarital children. *See* Proposed Code at 18 (citing Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-59 (1935)). Accordingly, it appears that congressional recognition of the citizenship claims of the foreign-born children of unwed mothers was fortified by the fact that many other countries had similar practices consistent with prevailing American sex-based views about unmarried mothers' and fathers' legal and caregiving relationships with their children. *See* Proposed Code at 18 (noting the rule that the mother "stands in place of the father" for nonmarital

children, that such a rule follows Roman law and American domestic law, and that "the laws of some thirty countries" recognize the citizenship status of nonmarital children of citizen mothers).

In the case before the Court, the United States has argued that in 1940 Congress eased the conditions under which mothers transmit citizenship to their foreign-born nonmarital children—and, in particular, exemption from the ten-year age-delimited parental residency requirement—out of concern for the risk of statelessness for that class of children. *See* Brief of United States, *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (No. 07-50445), 2008 WL 1848810. Based on the historical sources, this assertion is overstated and incomplete. For example, the primary legislative report on the 1940 Act refers to the risk of statelessness with respect to "foundlings," but not with respect to the nonmarital foreign-born children of citizen mothers. Proposed Code at 17-18. Proposed Section 203(c), codified in the 1940 Act as Section 204(c), provided that a "child of unknown parentage found in an outlying possession of the United States" would have U.S. nationality until proven otherwise. *Id.* The purpose of that provision, according to the report, was to "prevent unfortunate persons of the class mentioned from being stateless." Proposed Code at 17. By contrast, the report's remarks on proposed Section 204, which was to govern the transmission of citizenship from citizen parents to their nonmarital

foreign-born children, does not identify statelessness as a concern.[15]

Moreover, to the extent that any legislators were focused on the risk of statelessness to the foreign-born nonmarital children of citizen mothers in 1940 when they first created the statutory scheme, their attentiveness was selective in ways that powerfully reflected and perpetuated the sex-based beliefs concerning parental rights and responsibilities that have coursed through our citizenship laws generally.

Nationality and statelessness were subjects of intense study and international concern in the 1930s.[16] The most important American work on the subject was written by Catheryn Seckler-Hudson, a professor and the head of the department of government at American University. *See* Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (1934).[17] Seckler-

---

15. Section 204 of the Proposed Code was codified as Section 205 of the 1940 Act.

16. Nationality law and the related subject of statelessness were primary subjects of consideration at the First Conference for the Codification of International Law at The Hague in 1930. *See* Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 Am. J. Int'l L. 447, 453 (1930).

17. Seckler-Hudson's work was well known at the time of its publication and remained a prominently cited source on statelessness. *See, e.g.*, Ellery C. Stowell, Book Review, 30 Am. J. Int'l L. 170 (1936) (reviewing William O'Sullivan Molony, *Nationality and the Peace Treaties* (1934)); Maximilian Koessler, *"Subject," "Citizen,"*

Hudson wrote about the risk of statelessness facing the foreign-born nonmarital children of U.S. citizen mothers *and* fathers. *See id.* at 224-25.

As an initial matter, Seckler-Hudson was skeptical that, in 1934, the United States would recognize foreign-born nonmarital children of citizen fathers as American citizens, whether legitimated or not. *See id.* at 224 ("Legitimation does not necessarily offer a remedy [for statelessness] for these children."); *id.* at 220-21 (citing *Guyer v. Smith*, 22 Md. 239 (1864)). Accordingly, she observed that when such children were born in *jus sanguinis* countries in which they did not acquire nationality through the mother, they "had no effective citizenship." *Id.* at 221. *Cf.* William Samore, *Statelessness as a Consequence of the Conflict of Nationality Laws*, 45 Am. J. Int'l L. 476, 479 (1951) ("[T]he unacknowledged child of an American father born of an alien woman abroad would be stateless, providing the woman's state does not extend its nationality to the child.").

In addition—and of particular significance in this case—Seckler-Hudson noted the risk of statelessness for nonmarital children born to American fathers who did not satisfy the parental residency requirement. *See* Seckler-Hudson, *supra*, 220, 225 ("[T]he illegitimate child of a foreign-born father, the

---

"National," and "Permanent Allegiance", 56 Yale L.J. 58, 69 n.67 (1946); Comment, *The Expatriation Act of 1954*, 64 Yale L.J. 1164, 1196 n.161 (1955); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.15 (1963); *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958).

father being an American citizen but never having resided in the United States, would not be an American citizen" and "unless the country of his birth gave him its nationality, he would be stateless").[18] The risks of statelessness for foreign-born nonmarital children of citizen fathers were thus well known when Congress was considering the question of how to regulate citizenship transmission to nonmarital foreign-born children.

Congress was presented with, but chose not to enact, a legislative proposal that would have remedied the various risks of statelessness confronting foreign-born children of American citizen mothers *and* fathers. In her treatise, Seckler-Hudson described a sex-neutral and marriage-neutral citizenship transmission bill that had been introduced in Congress. It was the very same bill, described *supra* at 23, introduced in the early 1930s that provided that "[a]ny child, legitimate or illegitimate" born abroad of a citizen mother or

---

18. Seckler-Hudson did not specify whether she was referring to both legitimated and unlegitimated children in this passage, but her view that the United States did not regularly recognize the citizenship of nonmarital foreign-born children of citizen fathers regardless of legitimation suggests that the difference was not dispositive to her views. *See Seckler-Hudson*, *supra*, 224. In addition, given that the parental residency requirement in 1934 was of unspecified and minimal duration, *see supra* note 3, when Congress enacted the 1940 Act with a 10-year age-delimited parental residency requirement, the risk Seckler-Hudson observed would have increased significantly.

father was to be an American citizen, subject to a simple (and gender-neutral) parental residency requirement. *See* Seckler-Hudson, *supra*, 222 (quoting H.R. 5489, 72d Cong. (1931)). Despite the fact that the leading authority on statelessness endorsed such legislation, in 1940 and again in 1952 Congress enacted legislation that perpetuated and even intensified the sex inequalities in our *jus sanguinis* citizenship statutes by shoring up substantial barriers to citizenship transmission between a citizen father and his nonmarital foreign-born child.

In sum, it is possible that Congress was concerned about statelessness when it exempted unwed mothers from the lengthy parental residency requirement that applied to unwed fathers. But if this was so, Congress acted on its concern in a sex-discriminatory manner. Congress opted to ignore the acknowledged risk of statelessness that confronted nonmarital foreign-born children of citizen fathers. It also opted to ignore a proposed legislative solution that would have addressed any concern about statelessness in a more thorough, sex-neutral manner. Thus, to the extent that Congress's legislation in this area was prompted by a concern about statelessness, that concern was filtered through and premised on the same constellation of sex-based presumptions regarding how men and women behave as parents that has characterized the United States' approach to citizenship transmission since 1790.

Laws premised on historically rooted sex-based assumptions concerning how men and women behave

as parents—and how they *should* behave—have no place in the regulation of citizenship transmission today. Although certainly many nonmarital children are raised exclusively or primarily by their mothers, others—like Petitioner—are raised in their father's household. Our current domestic laws reflect these developments and eschew the antiquated notion that the mother bears singular responsibility for the nonmarital child. *See supra* note 10. It is no longer acceptable for Congress to enact laws that enforce gender-differentiated family roles by limiting individuals' rights as parents through sex-based classifications. The historical record demonstrates, however, that Congress has done just that in its regulation of *jus sanguinis* citizenship. With respect to foreign-born nonmarital children, Congress continues to enforce sex-based stereotypes and, in so doing, prolongs the vitality of gender-traditional beliefs concerning men's and women's respective roles as parents, even as such beliefs have eroded in other areas of law and in our social practices.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

LORELIE S. MASTERS
LINDSAY C. HARRISON
Counsel of Record
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
lharrison@jenner.com

Counsel for Amici Curiae

APPENDIX

AMICI CURIAE PROFESSORS OF HISTORY, POLITICAL SCIENCE, AND LAW*

Kerry Abrams is an Associate Professor of Law at the University of Virginia School of Law, where she is the Co-Director of the Center for Children, Families, and the Law. Professor Abrams teaches courses on immigration law, citizenship law, family law, and the history of marriage law. She has written extensively on the gendered aspects of immigration and citizenship law in American history. Her articles have appeared in the *Columbia Law Review*, the *Vanderbilt Law Review*, the *Yale Journal of Law & the Humanities*, and the *Minnesota Law Review*.

Candice Bredbenner is an Associate Professor of History at the University of Northern Carolina at Wilmington. She is the author of *A Nationality of Her Own: Women, Citizenship, and the Politics of Marriage* (1998), which was selected as an Outstanding Academic Book in 1998 by *Choice* magazine, a publication of the American Library Association's Association of College & Research Libraries. Professor Bredbenner teaches courses in U.S. history, citizenship, and civil liberties.

Christopher Capozzola is an Associate Professor of History at the Massachusetts Institute of Technology, where he teaches courses in political and legal history and the history of immigration. He was a 2004 Carnegie Scholar, has been a fellow in the

---

* Affiliations of *amici curiae* are listed for identification purposes only.

Visiting Scholars Program of the American Academy of Arts & Sciences, and is an elected Fellow of the Massachusetts Historical Society. He is the author of *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (2008). Professor Capozzola was awarded the Louis Pelzer Memorial Award of the Organization of American Historians and the Biennal Article Prize of the Society for Historians of the Gilded Age and Progressive Era. His articles have appeared in *American Quarterly*, the *Georgetown Law Journal*, *Journal of American History*, *Journal of Women's History*, *Law and History Review*, and the *New England Quarterly*.

Kristin Collins is an Associate Professor of Law and Peter Paul Development Professor at Boston University. Professor Collins teaches courses in legal history, citizenship law, and civil procedure. She has written extensively on the history of legal regulation of the family in America, and in particular on the history of parent-child citizenship transmission. Her articles have appeared in the *Yale Law Journal*, the *Vanderbilt Law Review*, the *Journal of American Culture*, and *American Studies International*.

Nancy F. Cott is the Jonathan Trumbull Professor of American History at Harvard University and the Pforzheimer Family Foundation Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. She is an elected fellow of the American Academy of Arts and Sciences. From 1975 to 2001, she taught at Yale University, where she co-founded the Women's Studies Program, which she chaired

from 1980 to 1987. She chaired the American Studies Program at Yale from 1994 to 1997. Her books include *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (1977) and *Public Vows: A History of Marriage and the Nation* (2000). Her articles have appeared in the *American Historical Review, Journal of American History, Journal of Social History, Yale Review, and American Quarterly*.

Linda K. Kerber is the May Brodbeck Professor of Liberal Arts and Sciences, Professor of History, and Lecturer in the College of Law at the University of Iowa. She is an elected member of the American Philosophical Society, an elected Fellow of the American Academy of Arts and Sciences, Past President of the American Historical Association, the Organization of American Historians, and the American Studies Association. She is the author of *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998), which won awards from the American Historical Association for the best book in U.S. legal history and the best book in women's history. She has also written *Women of the Republic: Intellect and Ideology in Revolutionary America* (1980), *Toward an Intellectual History of Women* (1997), and *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (1970).

Virginia Sapiro is Dean of the College and Graduate School of Arts & Sciences and Professor of Political Science at Boston University. From 1976 to 1995, she was a Professor of Political Science and Women's Studies at the University of Wisconsin-Madison, and was the Sophonisba P. Breckinridge

Professor from 1995 to 2007. She is an elected Fellow of the American Academy of Arts and Sciences, has served as Secretary and Vice President of the American Political Science Association (APSA), and is the founding President of the APSA Organized Section on Women and Politics Research. She is the author of *The Gender Basis of American Social Policy* (1986); *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States* (1984); and *The Political Integration of Women: Roles, Socialization, and Politics* (1983).

Rogers M. Smith is the Christopher H. Browne Distinguished Professor of Political Science at the University of Pennsylvania. He is an elected Fellow of the American Academy of Arts and Sciences and a recipient of the Wadsworth Publishing Award (2004), the David Easton Award (2001), the Horace Mann Bond Book Award (2000), and the Ralph Bunche Award (1998). From 2008 to 2009, he served as the Vice President of the American Political Science Association (APSA). He is the author of *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997), which was named a Pulitzer Prize Finalist; co-author of *Citizenship Without Consent* (1985); and *Gender at the Margins of Contemporary Constitutional Citizenship* (2009). He teaches courses on constitutional law and civil liberties.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 24 2010
OFFICE OF THE CLERK

No. 09-5801

IN THE

Supreme Court of the United States

RUBEN FLORES-VILLAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS ON STATELESSNESS IN SUPPORT OF PETITIONER

Max Gitter*
Matthew C. Vogele
Rishi N. Zutshi
Lisa M. Gouldy
Ebunoluwa A. Taiwo
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2610
mgitter@cgsh.com

Counsel for Amici Curiae
**Counsel of Record*

June 24, 2010

(8148 38

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THERE WAS – AND CONTINUES TO BE – A SUBSTANTIAL RISK OF STATELESSNESS FOR CHILDREN BORN ABROAD OF UNMARRIED U.S. FATHERS	7
A. The Laws of Many Countries Created – as of 1940 and 1952 – and Still Create a Risk of Statelessness for the Children Born Abroad of Unmarried U.S. Fathers	8
B. The Government's Reliance on the 1935 Article Is Misplaced for Other Reasons	15
C. The Presence of Large Numbers of Stateless Women Also Created and Creates a Risk of Statelessness for Non-Marital Children Born Abroad of U.S. Fathers	21

Page

II. THERE WAS AND IS A SUBSTANTIAL RISK OF STATELESSNESS FOR CHILDREN BORN ABROAD OF MARRIED U.S. FATHERS 22

CONCLUSION 28

CERTIFICATION 29

APPENDIX OF FOREIGN LAWS A1

TABLE OF AUTHORITIES

Page(s)

Statutes

8 U.S.C. § 1401(a)(7) ..... passim

8 U.S.C. § 1401(g) 23

8 U.S.C. § 1409 ..... passim

Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139 23

Laws of Foreign Countries A4-A21

Other Authorities

Acquisition and Loss of Nationality, Policies and Trends in 15 European States, Vol. 2: Country Analyses (Rainer Bauböck, Eva Ersboll, Kees Groenedijk & Harald Waldrauch eds., 2007) A1

Alfred M. Boll, Multiple Nationality and International Law (2007) A1

Julia Breslin & Toby Jones, "Qatar," in Women's Rights in the Middle East and North Africa 397 (Sanja Kelly & Julia Breslin eds., 2010) A1

Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, 2009 Human Rights Report: Qatar (Mar. 11, 2010) A1

Page(s)

Citizenship Policies in the New Europe (Rainer Bauböck, Bernhard Perchinig & Wiebke Sievers eds., expanded & updated ed. 2009) A1

The Civil Code of Iran (Mostafa Shahabi trans., 2007) A1

A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties (Richard W. Flournoy, Jr. & Manley O. Hudson eds., 1929) A2

Rupert Colville, New Twist to a Sad Tale, Refugees (UNHCR), Sept. 25, 2007, at 2 ... 21

Comm. on the Elimination of Discrimination against Women, Combined Initial and Second Periodic Reports of States Parties: Bahrain, U.N. Doc. CEDAW/C/BHR/2 (Nov. 12, 2007) A2

Comm. on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Libyan Arab Jamahiriya, U.N. Doc. CEDAW/C/LBY/CO/5 (Feb. 6, 2009) A2

Comm. on the Elimination of Discrimination against Women, Initial Periodic Report of States Parties: United Arab Emirates, U.N. Doc. CEDAW/C/ARE/1 (Sept. 17, 2008) ... A2

Page(s)

Comm. on the Elimination of Racial Discrimination, Initial Periodic Report of States Parties due in 2004: Oman, U.N. Doc. CERD/C/OMN/1 (Apr. 25, 2006) A2

Comm. on the Rights of the Child, Consideration of Reports Submitted By States Parties Under Article 44 of the Convention, Concluding Observations: Libyan Arab Jamahiriya, U.N. Doc. CRC/C/15/Add. 209 (July 4, 2003) A3

Dilek Çinar & Harald Waldrauch, "Austria," in Acquisition and Loss of Nationality, Policies and Trends in 15 European States, Vol. 2: Country Analyses (Rainer Bauböck, Eva Ersbøll, Kees Groenedijk & Harald Waldrauch eds., 2007)..... 19

Div. for the Dev. and Codification of Int'l Law, U.N. Legal Dep't, Laws Concerning Nationality, U.N. Doc. ST/LEG/SER.B/4, U.N. Sales No. 54.V.1 (1954) 19-20, A3

Div. of Programme Support & Mgmt., U.N. High Comm'r for Refugees, 2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons (2010)..... 15, 21

Laurie Fransman, British Nationality Law (2d ed. 1998)..... A3

J. Mervyn Jones, British Nationality Law and Practice (1947) A3

Page(s)

Raphaël Lemkin, Axis Rule in Occupied Europe (The Lawbook Exchange 2005) (1944) 19

Bronwen Manby, Open Society Inst., Citizenship Law in Africa: A Comparative Study (2009) A3

Prachi Mishra, Emigration and Brain Drain: Evidence From the Caribbean (IMF Working Paper, No. WP/06/25, 2006) 15

Nationality and International Law in Asian Perspective (Ko Swan Sik ed., 1990) A3

Gianluca P. Parolin, Citizenship in the Arab World (2009) A3

Durward V. Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248 (1935) ..... passim

Catheryn Seckler-Hudson, Statelessness: With Special Reference to the United States (1934) 6

Charles Sudetic, "Historical Setting," in Albania: A Country Study (Raymond Zickel & Walter R. Iwaskiw eds., Library of Congress 1992) 19

Page(s)

To Revise and Codify the Nationality Laws of the U.S. Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization, 76th Cong. 431 (1945) 5

U.N. Econ. & Soc. Council, A Study of Statelessness, U.N. Doc. E/1112 (1949) 22

Laura van Waas, Nationality Matters: Statelessness Under International Law (2008) 21

World Bank, Refugee Population by Country or Territory of Origin 15

BRIEF OF *AMICI CURIAE* SCHOLARS ON STATELESSNESS IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICI CURIAE*

Amici have devoted much of their careers to teaching, writing about, and studying statelessness and related subjects, particularly refugees and asylum, migration, and citizenship laws, and they are familiar with the literature and studies of statelessness:

- **Dr. Alice Edwards** is a member of the Faculty of Law at the University of Oxford, where she is Lecturer in International Refugee and Human Rights Law at the university's Refugee Studies Centre. She teaches an external short course specifically devoted to statelessness, the only one in the world, and other courses that have modules on statelessness. Among her many publications, she authored a paper for the United Nations High Commissioner for Refugees (for whom she has served as a legal adviser) entitled, Displacement, Statelessness and Questions of Gender Equality under the United Nations Convention on the Elimina-

[1] All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution to its preparation or submission

tion of All Forms of Discrimination against Women (2009). In 2010, she was awarded a British Academy grant to continue her work on questions of "effective nationality" and de facto statelessness. More information is available at: http://www.rsc.ox.ac.uk/index.html?edwards.

- **Jacqueline Bhabha** is the Jeremiah Smith Jr. Lecturer in Law at Harvard Law School, the Director of the Harvard University Committee on Human Rights Studies, and a Lecturer in Public Policy at the Kennedy School, where she teaches courses on refugees and international law. Her writings on issues of migration and asylum in Europe and the United States include a coauthored book, Women's Movement: Women Under Immigration, Nationality and Refugee Law (1994), an edited volume, Asylum Law And Practice in Europe and North America (1992), a book chapter entitled, The "Mere Fortuity of Birth?": Children, Borders, and the Right to Citizenship (2009), discussing the issue of statelessness, and an edited volume, Children Without a State: A Global Human Rights Challenge (forthcoming 2011). More information is available at: http://www.hks.harvard.edu/about/faculty-staff-directory/jacqueline-bhabha.

- **Kim Rubenstein** is a Professor and Director of the Centre for International and Public Law (CIPL) at the Australian National University College of Law. She has particular

expertise in citizenship laws, and her book Australian Citizenship Law in Context (2002) is a seminal work. Professor Rubenstein is the co-editor of the Cambridge University Press series Connecting International Law with Public Law. She has appeared three times in the High Court of Australia on citizenship matters, and her work was cited in the High Court judgment of Singh v. Commonwealth (2004). In 2002-2003 she was based at Georgetown University Law Center as a Fulbright Senior Scholar writing on the status of nationality in the international law context. More information is available at: http://law.anu.edu.au/scripts/StaffDetails.asp?StaffID=378.

- **Audrey Macklin** is a Professor at the Faculty of Law at the University of Toronto where she teaches courses on immigration and refugee law and administrative law. Professor Macklin has published extensively on citizenship and the status of refugees, including articles in the European Journal of Migration and Law, Georgetown Immigration Law Journal, and Human Rights Quarterly. She has received grants from the United Nations Population Fund, Law Commission of Canada, and Social Sciences and Humanities Research Council for her research on refugees, law and citizenship, and the legal aspects of conflict-induced migration by women. More information is available at: http://www.law.utoronto.ca/faculty_content.asp?profile=36&cType=facMembers&itemPath=1/3/4/0/0.

- **David Baluarte** is a member of the faculty at the American University Washington College of Law, where he teaches in the International Human Rights Law Clinic. He has worked extensively on issues of statelessness in the Dominican Republic, producing numerous analyses of that country's immigration and nationality laws and recent constitutional reform in the context of litigating the implementation phase of the landmark decision of the Inter-American Court for Human Rights, Yean and Bosico v. Dominican Republic (2005). Recently, he has acted as a consultant for the Equal Rights Trust and produced a regional study of statelessness in North and South America, surveying the regions' immigration and nationality laws and assessing the level of protection provided to stateless persons.

Amici submit this brief to bring to the attention of this Court data and citations pertinent to the assertion by Respondent United States government that a valid congressional concern about statelessness justifies the discrimination against U.S. citizen fathers embodied in 8 U.S.C. §§ 1401(a)(7) and 1409(a), (c) (1974) (the "Statute at Issue").

INTRODUCTION AND SUMMARY OF ARGUMENT

A principal justification asserted by the U.S. government and the United States Court of Appeals for the Ninth Circuit for the discrimination against U.S. citizen fathers worked by the Statute at Issue, and which this brief addresses, is to prevent statelessness in non-marital children born abroad. Specifically, the government asserts: "[T]he risk that a child who is born abroad to unmarried parents will be rendered stateless is much higher when his mother is a United States citizen [than when his father is a U.S. citizen]." U.S. Br. Opp'n to Cert. 15 (emphasis added).

Amici are aware of no study or compilation of data that establishes or supports this assertion. The one source cited by the government and the Court of Appeals does not do so. That source is a brief passage on one page of a transcript of the 1940 hearings on the Statute at Issue that in turn references one page of a 1935 law review article – a page that does not deal with or mention statelessness. To Revise and Codify the Nationality Laws of the U.S. Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization, 76th Cong. 431 (1945); Durward V. Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 258-59 (1935) (the "1935 Article").

Viewed in totality, the evidence about the factors relevant to statelessness demonstrates that the risk of parenting stateless children abroad was as of 1940 (when the Statute at Issue was enacted) and as of 1952 (when it was amended in the form applied to Petitioner), and remains as of today, substantial for unmarried U.S. fathers, a risk equal to or perhaps greater than that for unmarried U.S. mothers.[2] Those factors include not only the citizenship/nationality[3] laws of other countries but also a factor ignored by the government – the existence of large populations of stateless women abroad. The relevant data suggest that the special residence requirements for U.S. fathers in the Statute at Issue may have enlarged in the past, and may continue today to enlarge, the total pool of stateless children by making it more difficult (and in some cases, such as this one, impossible) for U.S. fathers who have undertaken the burdens of establishing paternity and providing financial support to pass on their U.S. citizenship to their non-marital children born abroad.

---

[2] For an earlier historical perspective, see generally Catheryn Seckler-Hudson, Statelessness: With Special Reference to the United States 220-21 (1934) (discussing risks of statelessness for foreign-born non-marital children of United States citizen fathers and foreign mothers).

[3] The terms "citizenship" and "nationality" are used interchangeably for purposes of this brief, except with regard to British Commonwealth dominions, colonies and territories, where "nationality" is used.

ARGUMENT

I

THERE WAS – AND CONTINUES TO BE – A SUBSTANTIAL RISK OF STATELESSNESS FOR CHILDREN BORN ABROAD OF UNMARRIED U.S. FATHERS

The citizenship laws of many countries – and other factors – show that U.S. citizen fathers, if hindered as they have been by the residence strictures of the Statute at Issue in passing on their U.S. citizenship, create a significant risk of stateless non-marital children born abroad. The Court of Appeals below, and the U.S. government now, ignore all but one of the factors, and they also overlook key evidence about the one factor on which they do focus, i.e., certain categories of laws of selected countries mentioned on one page of the 1935 Article, and even language on the next page of the article. It is important to bear in mind throughout that the discriminatory residence requirements at issue do not come into play unless the U.S. father has established paternity and agreed to provide financial support. See 8 U.S.C. § 1409(a). Moreover, in some cases, such as applied to petitioner, the residence requirements could not physically be met because of age limitations requiring at least five years of the residence to accrue after the age of fourteen years.

A. The Laws of Many Countries Created – as of 1940 and 1952 – and Still Create a Risk of Statelessness for the Children Born Abroad of Unmarried U.S. Fathers

The government acknowledges that when the law of a country does not permit the mother to assign her nationality to a non-marital child, the government's rationale for discrimination against fathers is undermined. U.S. Br. Opp'n to Cert. at 15 & n.7. The government presumes that only one such country, Iran, does or did so. Id. at 15. The government's presumption is incorrect.

In fact, the laws of many countries do not (which, for this purpose, includes did not) permit their citizen mothers to assign their citizenship to a non-marital child born within the mother's country.[4] Some do not allow the mother to do so in any circumstances; others do not allow the mother to do so when the alien father can be merely identified; others do not permit the mother to do so when the alien father so much as acknowledges that the child is his; others do not permit the mother to do

[4] Amici have reviewed the relevant statutes of the countries cited herein. They are not, however, in a position to report on the court decisions and administrative regulations of every country, which may serve in some cases to fill the gaps in the relevant statutes or perhaps even to contradict them. For the effects of court decisions and regulations, Amici have relied on standard secondary sources such as treatises and published studies to do so as far as possible. Those secondary sources are identified in the Appendix, both generally, and on a country-by-country basis.

so when the alien father legitimates the child; and some countries strip the child of the citizenship passed by the mother upon the alien father's legitimation of the child – whether or not the father is able in fact to pass on his citizenship.[5] These countries include at least the following: **Afghanistan** (as of 1940) (requiring both parents to be citizens unless child takes up permanent residence after reaching majority) (A4);[6] **Bahrain** (as of 2010) (mother may not pass citizenship unless father is unknown or stateless or fatherhood is not substantiated) (A4); **Bhutan** (as of 2010) (requiring both parents to be citizens) (A5); **Burma (Myanmar)** (as of 2010) (requiring both parents to be citizens) (A6); **Cameroon** (as of 2010) (mother may not pass citizenship unless father is stateless or of unknown nationality or did not filiate first) (A6); **Ceylon (Sri Lanka)** (as of 1952) (mother may not pass citizenship unless father has not legitimated) (A7); **China** (as of 1940) (mother may not pass citizenship unless father is unknown or stateless or has not legitimated) (A7); **Egypt** (as of 1940) (mother may not pass citizenship if paternity is established) (A7); **Finland** (as of 1940) (requiring both parents to be citizens, except that if father of non-marital child loses Finnish nationality in certain circum-

---

[5] Several countries make exceptions for certain categories of alien fathers, such as fathers from certain ethnicities, but to our knowledge none excepts U.S. fathers. See, e.g., Egypt (A7).

[6] A_ refers to the page number of the Appendix that contains the relevant statutory (or constitutional) citations and/or secondary source for each country.

stances child retains citizenship of Finnish mother) (A7-A8); **Germany** (as of 1940) (citizenship through mother lost upon father's legitimation) (A8); **Guinea** (as of 2010) (recognizing nationality of the parent that first filiated) (A9); **Iran** (as of 1940 and 2010) (mother can never pass citizenship at birth, though child can apply for citizenship at age 18) (A9-A10); **Iraq** (as of 1940 and until 2005) (mother can never pass citizenship at birth, though child can obtain citizenship after reaching age of majority) (A10); **Japan** (as of 1940) (mother may not pass citizenship unless father is stateless or cannot be identified) (A11); **Trans-Jordan** (as of 1940) (mother can never pass citizenship at birth) (A11); **Jordan** (as of 2010) (mother may not pass citizenship unless father is stateless or of unknown nationality or has not filiated) (A11); **Korea** (as of 1952) (mother may not pass citizenship unless father is unknown or stateless) (A12); **Kuwait** (as of 2010) (mother may not ask Ministry of Interior for permission to pass citizenship unless father is unknown or father's kinship has not been legally established) (A12); the **Netherlands** (together with **Aruba** and **Suriname**, which were then under Dutch rule) (as of 1940) (mother may not pass citizenship unless father has not acknowledged child) (A14); **Oman** (as of 2010) (mother may not pass citizenship unless father is unknown or stateless) (A15); **Qatar** (as of 2010) (mother can never pass citizenship) (A16); **Romania** (as of 1940) (citizenship through mother lost upon legitimation) (A16); **Saudi Arabia** (as of 2010) (mother may not pass citizenship at birth unless father is

stateless or of unknown nationality, but child can apply for citizenship after reaching majority if permanent resident) (A17); **Senegal** (as of 2010) (mother may not pass citizenship unless she filiates first or unless father is stateless or of unknown nationality) (A17); **Sudan** (as of 2010) (mother may not pass citizenship) (A17); **Swaziland** (as of 2010) (mother may not pass citizenship unless father fails to claim or adopt) (A18); **Taiwan** (as of 1952) (mother may not pass citizenship unless father is unknown or stateless or has not legitimated) (A19); **Togo** (as of 2010) (mother may not pass citizenship unless father is stateless or of unknown nationality) (A19); **United Arab Emirates** (as of 2010) (mother may not pass citizenship unless father is unknown) (A20); and **Yemen** (as of 2010) (mother may not pass citizenship unless father is not legally established or is stateless or of unknown nationality) (A21).[7]

In all of these countries, there is a severe or moderate risk that the child of a U.S. father and a local mother will be stateless, unless the father can satisfy the discriminatory residence tests in the Statute at Issue.

---

[7] Throughout the brief, in some of the countries cited the mother may nevertheless commence administrative proceedings, which can be very onerous, and which if successful could restore the child's citizenship through the mother. At the same time, as stated in the text, some countries actually would divest the child of its mother's citizenship if the child is legitimated by an alien father.

Also significant, as of 1940 the statutes of more than three dozen countries (including nearly all of the British Commonwealth dominions and colonies which held the common British subject status and not independent citizenship) did not permit their female citizens to assign nationality to a non-marital child born outside the subject country with a foreign father. Several countries retain such a provision in their laws today. The 1935 Article and the government ignore this category of laws. The countries that then posed, or now pose, this second category of risk of statelessness for non-marital children born abroad of U.S. citizen fathers include at least the following: **Andorra** (as of 1940) (mother can never pass citizenship to child born abroad) (A4); **Australia** (as of 1940) (mother can never pass nationality to child born abroad) (A4); **Brunei** (as of 2010) (mother can never pass citizenship to child born abroad) (A5); **Canada**[8] (as of 1940) (mother can never pass nationality to child born abroad) and (as of 2010) (citizenship by descent is limited to only one generation born abroad) (A6); **India** (as of 1940 and 1952) (first under U.K. law, and later under independent domestic law, mother can never pass nationality to child born abroad) (A9); **Indonesia** (as of 1952) (*jus soli* but mother may not pass citizenship unless she is sole legally acknowledged parent) (A9); **Ireland** (as of 1940)

[8] While the citizenship laws of some countries, including Canada and Israel as of 2010, treat mothers and fathers the same for the purposes of transmission of citizenship to non-marital children born abroad, they are listed because of the restrictions they impose on births abroad.

(mother can never pass nationality to child born abroad) (A10); **Israel** (as of 2010) (citizenship by descent is limited to only one generation born abroad) (A10); **Kenya** (as of 2010) (mother can never pass citizenship to child born abroad) (A11); **Lebanon** (as of 2010) (mother cannot pass citizenship if father has filiated at the time of birth) (A12); **Liberia** (as of 1940) (mother can never pass citizenship to child born abroad) (A12); **Libya** (as of 1940 and 2010) (mother can never pass citizenship to child born abroad) (A12); **Mauritania** (as of 2010) (mother can never pass citizenship at birth to child born abroad, though child can apply for citizenship in the year preceding the age of majority) (A13); **Mexico** (as of 1940) (mother may not pass citizenship to child born abroad unless father is unknown) (A13); **Nepal** (as of 1952 and 2010) (mother can never pass citizenship to child born abroad) (A14); **New Zealand** (as of 1940) (mother can never pass nationality to child born abroad) (A14); **Pakistan** (including the territory that later became **Bangladesh**) (as of 1940 and 1952) (first under U.K. law, and later under independent domestic law, mother can never pass nationality to child born abroad) (A15); **Somalia** (as of 2010) (mother can never pass citizenship to child born abroad) (A17); **South Africa** (as of 1940) (mother can never pass nationality to child born abroad) (A17); **Suriname** (as of 2010) (mother cannot pass citizenship to child born abroad if the child is acknowledged) (A18); **Syria** (as of 2010) (mother can never pass citizenship to child born abroad) (A18); **Thailand** (as of 1940) (mother cannot pass

citizenship to child born abroad unless father is unknown) and (as of 1952) (mother cannot pass citizenship to child born abroad unless father is unknown or stateless) (A19); **Trinidad and Tobago** (as of 2010) (mother cannot pass citizenship to child born abroad if paternity is admitted or established) (A19); **Tunisia** (as of 2010) (mother cannot pass citizenship to child born abroad unless father is unknown, stateless, or of unknown nationality) (A20); **Vietnam** (as of 1940) (mother cannot pass citizenship to a child born abroad in a non-*jus soli* country unless father is unknown) (A21); and the **United Kingdom** (and at least the following British Commonwealth colonies and territories[9] that applied U.K. law: the **Bahamas**, **Barbados**, **Belize**, **Bermuda**, **Botswana**, **British Virgin Islands**, **Cayman Islands**, **Gambia**, **Ghana**, **Guyana**, **Hong Kong**, **Jamaica**, **Kenya**, **Lesotho**, **Malawi**, **Malaysia**, **Malta**, **Mauritius**, **Nigeria**, **Palestine**, **Seychelles**, **Sierra Leone**, **Singapore**, **Sudan**, **Swaziland**, **Tanzania**, **Trinidad and Tobago**, **Uganda**, **Zambia**, and **Zimbabwe**) (as of 1940) (mother can never pass nationality to child born abroad) (A20).

This category of countries was significant as of 1940 and 1952 because of the large numbers of refugees outside their home countries created by World War II and its aftermath. See infra pp. 21-22 and note 13. It is also significant today because of the large number of citizens from some of those

[9] This brief uses the contemporary names of these states, some of which had different colonial names in 1940.

countries who live abroad either as migrant workers or refugees (including stateless refugees) – e.g., Jamaica, Kenya, Lebanon, Mauritania, Somalia, and Syria.[10]

Virtually none of the laws discussed above, which posed and continue to pose a risk of statelessness for children of U.S. fathers, are included in the list of countries identified in the 1935 Article.

B. The Government's Reliance on the 1935 Article Is Misplaced for Other Reasons

As we have seen, the 1935 Article cited by the government for its conclusion of a "much higher" risk for U.S. mothers ignores the laws of many countries that did not or do not assign the mother's

---

[10] See Div. of Programme Support & Mgmt., U.N. High Comm'r for Refugees [UNHCR], 2009 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons (2010), available at http://www.unhcr.org/4c11f0be9.pdf (listing Somalia as the third largest producer of refugees as of 2008 with 678,300 refugees and discussing Kenya as a major refugee producing country in 2008 arising from election violence, producing 9,620 refugees and accounting for 15,400 new asylum applications); The World Bank, Refugee Population by Country or Territory of Origin, available at http://data.worldbank.org/indicator/SM.POP.REFG.OR (for 2008, listing Lebanon as the country of origin for 12,967 refugees, Mauritania for 45,601, Somalia for 561,155, and Syria for 15,211); Prachi Mishra, Emigration and Brain Drain: Evidence From the Caribbean (IMF Working Paper, No. WP/06/25, 2006), available at http://www.imf.org/external/pubs/ft/wp/2006/wp0625.pdf (estimating that over 75% of the educated labor force in Jamaica has migrated to OECD Member Countries).

citizenship in cases of non-marital births, or if they did or do permit the mother to pass citizenship to non-marital children, it was or is in limited circumstances. There are other reasons why the government's reliance on that excerpt from the 1935 Article is misplaced.

First, the government, paraphrasing one sentence in the 1935 Article, says: "in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation)." U.S. Br. Opp'n to Cert. at 13-14. In fact, the relevant sentence states: "The laws of approximately thirty countries provide for nationality of illegitimate children, in the absence of acknowledgement or legitimation . . . such children follow the mother's nationality . . . ." 1935 Article at 258. It certainly does not follow, as the government goes on to say, that "the result . . . was to create a risk of statelessness among the foreign-born children of unwed United States citizen mothers" and that that risk is "much higher" for U.S. mothers than U.S. fathers. Id. at 14-15. Notably, the author of the 1935 Article does not purport to claim that children born to a U.S. mother and local father in these 30 countries would become stateless. The sentence paraphrased by the government merely claims that the *jus sanguinis* sections of the laws of those 30 countries favored passage of the mother's citizenship in the case of illegitimate children, but in fact many of those statutes also contained partial *jus soli* provisions

that would bestow citizenship upon a child born within that country under certain circumstances. For instance, the statutes of Italy (A11) and France (A8) provided that a child born domestically that did not otherwise obtain the citizenship of its parents would become a citizen.

Further, as the author of the article goes on to point out, "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality." 1935 Article at 259. The footnote to this sentence cites the statutes of sixteen countries with laws that dealt with out-of-wedlock births and followed this majority rule. Id. at 259 n.40. These sixteen countries include China (A7), Germany (A8), and Romania (A16), all of which stripped the child of its mother's citizenship upon legitimation by an alien father. For example, in Germany in 1940 (and as of 1952) the "illegitimate child of a German woman" would ordinarily at birth acquire the "citizenship of the mother." Law of Nationality of July 22, 1913, RGBl. 46 at 583, § 4 (Germany) (A8). However, upon the "legitimation" of that child by a "foreigner," if such legitimation was effective under German law, the child would actually lose its German citizenship – regardless of whether it could thereby obtain the citizenship of its newly legitimizing father. Id. at § 17(5). Other countries that divested – or now divest – a non-marital child of citizenship originally passed to it through the mother, upon acknowledgment or legitimation by an alien father, include: **Ceylon (Sri Lanka)** (as of 1952) (non-marital child only

takes mother's nationality if not "legitimated") (A7); **Egypt** (as of 1940) (non-marital child does not take the mother's nationality if paternity is established) (A7); the **Netherlands** and the countries following its law (as of 1940) (non-marital child only takes mother's nationality if "not acknowledged") (A14); **Poland** (as of 1940) (non-marital child takes father's citizenship if legitimated) (A15); **Senegal** (as of 2010) (non-marital child who is legitimated during childhood acquires Senegalese nationality if father is Senegalese) (A17); **Taiwan** (as of 1940) (applying Chinese law) (A19); and **Tunisia** (as of 2010) (non-marital child is considered to have never been Tunisian if foreign father's paternity is established) (A20).

The 1935 Article goes on to identify seven additional countries with laws that created yet an additional risk of statelessness for non-marital children born to U.S. fathers: "in case of legal acknowledgment or recognition, the nationality of the parent whose relationship is first legally established prevails, unless that of both is established by the same instrument, or simultaneously, in which case the nationality of the father takes precedence . . . ." 1935 Article at 259.

Moreover, when the author earlier in the article discusses children born in wedlock, rather than out of wedlock, he states: "[B]y far the larger number follow the rule of descent through the father," noting that 47 countries had rules passing nationality through descent from the father while also noting that only "nine countries have specific conditional

rules of *jus sanguinis* under which nationality is acquired by descent from the mother." Id. at 254, 256.

In sum, the 1935 Article, read in its entirety, and even taken on its own terms, indicates a substantial risk of statelessness under the laws of many countries for the children of U.S. fathers born abroad – both in wedlock, and also, as in the situation at bar, out of wedlock, when the father has acknowledged his paternity or it has otherwise been established.

Second, several of the laws regarding non-marital births in the 30-some countries referenced in the 1935 Article were rendered somewhat irrelevant to the issue of statelessness for children of U.S. mothers by 1940, and for a period thereafter, because several of the countries listed were under Axis occupation or had been absorbed into the Soviet Union by 1940.[11] Today, the list of laws from 30-odd

[11] By 1940, Austria and Danzig were under occupation by Germany and applied German law, and Albania had been invaded by Italy and ceased to exist as an independent country. Dilek Çinar & Harald Waldrauch, "Austria," in Acquisition and Loss of Nationality, Policies and Trends in 15 European States, Vol. 2, Country Analyses 19, 24 (Rainer Bauböck, Eva Ersboll, Kees Groenedijk & Harald Waldrauch eds., 2007); Raphael Lemkin, Axis Rule in Occupied Europe 155-56 (The Lawbook Exchange 2005) (1944) (Danzig); Charles Sudetic, "Historical Setting," in Albania: A Country Study (Raymond Zickel & Walter R. Iwaskiw eds., Library of Congress 1992), available at http://lcweb2.loc.gov/frd/cs/altoc.html. Estonia and Lithuania had been absorbed into the Soviet Union by 1940 and applied Soviet citizenship law. See Decree of 7 September 1940, Concerning the Acquisition of

countries cited in the article has become even less relevant to issues of statelessness for children born abroad to U.S. mothers, because the citizenship laws of many countries have been materially amended – e.g., Estonia (A7); Lithuania (A13) – or now include fail-safe mechanisms to guard against statelessness for children born in those countries – e.g., Bulgaria (A5-A6); France (A8); Greece (A8); and Portugal (A16).

Third, in the paragraph immediately preceding the identification of the "approximately thirty countries" on which the government relies, the 1935 Article explains that the laws of approximately 40 other countries made no provision for "an illegitimate child [to take] the nationality of the mother." 1935 Article at 258. Thus, to the extent the government relies on the laws of the 30 countries cited in the article as providing a full sample, that reliance is further misplaced. In fact, the article indicates that countries making no such specific provision for illegitimate children outnumbered those that permitted the nationality of the mother to be transmitted to such children.

USSR Citizenship by Nationals of the Lithuanian, Latvian and Estonian Soviet Socialist Republics (U.S.S.R.), reprinted in Div. for the Dev. and Codification of Int'l Law, U.N. Legal Dep't, Laws Concerning Nationality 463, U.N. Doc. ST/LEG/SER.B/4, U.N. Sales No. 54.V.1 (1954).

C. The Presence of Large Numbers of Stateless Women Also Created and Creates a Risk of Statelessness for Non-Marital Children Born Abroad of U.S. Fathers

When the mother is stateless, the residence burdens created for U.S. fathers by the Statute at Issue create a self-evident risk of stateless children – whether the laws of the country of birth look to the mother or the father in determining the citizenship of a non-marital child.

Today, it is estimated that there are between 6.6 million and 15 million stateless persons.[12] Whatever the precise contours of the citizenship laws of any country in which U.S. citizen males are present, the presence of large numbers of stateless women poses a risk of statelessness for the non-marital children born abroad to U.S. fathers. That risk was especially severe in the period starting before World War II and through the 1940s. The

---

[12] UNHCR, 2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons, (2010) (stating that 6.6 million stateless persons have been reliably identified in sixty countries and estimating twice that number of stateless persons worldwide, not including stateless refugees and asylum-seekers); Rupert Colville, New Twist to a Sad Tale, Refugees (UNHCR), Sept. 25, 2007, at 2, available at http://www.unhcr.org/46d2e8dc2.html ("[UNHCR] believes the true total may be closer to 15 million."). See also Laura van Waas, Nationality Matters: Statelessness Under International Law 10 (2008) (noting that although it is "unlikely" a precise figure on stateless persons will ever be available, "all estimates point towards statelessness being an issue of global proportions and reach").

dislocations of war, wartime changes in citizenship laws, the stripping of citizenship rights from some citizens, and other factors created vast numbers of female refugees/stateless women in Europe and Asia,[13] and therefore a prescription for the Statute at Issue to exacerbate the risk of statelessness for children.

II

THERE WAS AND IS A SUBSTANTIAL RISK OF STATELESSNESS FOR CHILDREN BORN ABROAD OF MARRIED U.S. FATHERS

The government argues, in effect, that the residence requirements in the Statute at Issue are based on the concept that different residence burdens for mothers and fathers are called for when the risk that a child born to such parent will be rendered stateless is much higher for one gender

[13] A 1949 United Nations report on statelessness provided the following overview of the problem:

> In 1937 France had to take in over 100,000 Spanish Republicans and in 1939, over 400,000. Since that time Spanish refugees have continued to enter clandestinely. Immediately before and during the Second World War the exodus of Germans opposed to nazism and fascism and of persecuted Jews from the Axis countries and the occupied territories greatly increased. In the Far East population movements occurred as a result of Japanese aggression. At the present time an interrupted stream of refugees from the East European countries is flowing towards the West.

U.N. Econ. & Soc. Council, A Study of Statelessness, § II, ¶ 1, U.N. Doc. E/1112 (1949).

than for the other. As just discussed, in the context of unmarried parents the government's argument is not supported by the evidence. The government rationale is further weakened by the fact that, in the context of a married U.S. citizen having a child abroad with a foreign spouse, the Statute at Issue imposes equal residence burdens for U.S. mothers and U.S. fathers despite the fact that the state of the law abroad creates, and created in 1940, a greater risk of parenting stateless children abroad for U.S. fathers married to foreign citizens than for similarly situated U.S. mothers.[14]

At least the following countries did not, or today do not, permit their female nationals to pass their citizenship to a child born in a marriage to a foreign national, despite the fact that they do permit their male nationals to pass their citizenship to a

---

[14] In 1940 the Statute at Issue imposed, and still imposes today, equal residency burdens on U.S. citizen mothers and fathers married to foreign citizens in order for the U.S. parent to pass on his or her nationality to a child born abroad. In 1940, the Statute at Issue provided that a U.S. citizen parent (of either sex) married to a foreign citizen must have had "ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years" in order to pass his or her U.S. nationality to a child born abroad. Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139. The Statute at Issue currently provides that a U.S. citizen parent (of either sex) married to a foreign citizen must have been "physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years" in order to pass his or her U.S. nationality to a child born abroad. 8 U.S.C. § 1401(g).

child born in marriage to a foreign national: **Afghanistan** (as of 1940 and 2010) (in country, mother loses Afghan citizenship upon marrying and thus cannot pass citizenship, although child will still be Afghan if either parent was born in Afghanistan and lived there continuously; abroad, mother cannot pass citizenship) (A4); **Bahrain** (as of 2010) (mother loses Bahraini citizenship upon marrying and thus cannot pass citizenship) (A4); **Belgium** (as of 1940) (married mother cannot pass citizenship but child, if born in Belgium, may apply for citizenship if certain residence requirements are met) (A5); **Brazil** (as of 1940) (married mother may not pass citizenship to child born abroad) (A5); **Ceylon (Sri Lanka)** (as of 1952) (married mother may not pass citizenship) (A7); **El Salvador** (as of 1940) (married mother may not pass citizenship to child born abroad) (A7); **Germany** and **Austria** (as of 1940) (all foreign women marrying a German man become German, and all German women marrying a foreign man lose their citizenship) (A8, A4); **Guatemala** (as of 1940) (*jus soli*, but married mother may not pass citizenship to child born abroad) (A8-A9); **Iran** (as of 2010) (married mother cannot pass citizenship at birth, but child, if born in Iran, may apply for citizenship at age 18) (A9-A10); **Iraq** (as of 1940 and until 2005) (married mother cannot pass citizenship at birth, but child, if born in Iraq, may obtain citizenship after reaching age of majority) (A10); **Jordan** (as of 2010) (married mother cannot pass citizenship unless child is born in country and father is stateless) (A11); **Kiribati** (as of 2010) (married

mother cannot pass citizenship) (A11); **Kuwait** (as of 2010) (married mother can never pass citizenship) (A12); **Lebanon** (as of 2010) (married mother cannot pass citizenship if child is born abroad) (A12); **Libya** (as of 2010) (married mother cannot pass citizenship if child is born abroad) (A12); **Luxembourg** (as of 1940) (married mother can never pass citizenship) (A13); **Malaysia** (as of 2010) (married mother cannot pass citizenship to child born abroad) (A13); **Mexico** (as of 1940) (married mother cannot pass citizenship to child born abroad) (A13); **Monaco** (as of 1940) (married mother can never pass citizenship) (A14); **Nepal** (as of 2010) (neither married mother nor father can pass citizenship to child born abroad) (A14); the **Netherlands** and the countries following its law (as of 1940) (married mother cannot pass citizenship to child unless child is born in Netherlands and father is stateless or of unknown nationality) (A14); **Norway** (as of 1940) (married mother can never pass citizenship) (A15); **Oman** (as of 2010) (married mother cannot pass citizenship unless father is stateless) (A15); the **Philippines** (until 1973) (married mother cannot pass citizenship until child reaches majority) (A15); **Poland** (as of 1940) (married mother can never pass citizenship) (A15); **Romania** (as of 1940) (married mother can never pass citizenship) (A16); **Qatar** (as of 2010) (married mother can never pass citizenship) (A16); **Saudi Arabia** (as of 1940) (married mother cannot pass citizenship if child is born abroad) and (as of 2010) (married mother cannot pass citizenship at birth, but child can apply for citizenship after

reaching maturity if permanently residing in Saudi Arabia) (A16-A17); **Senegal** (as of 2010) (married mother cannot pass citizenship unless father is stateless or of unknown nationality, but child may apply for citizenship between ages of 18 and 25) (A17); **Suriname** (as of 2010) (married mother can never pass citizenship) (A18); **Sweden** (as of 1940) (married mother can never pass citizenship) (A18); **Syria** (as of 1940 and 2010) (married mother cannot pass citizenship if child is born abroad) (A18); **Togo** (as of 2010) (married mother cannot pass citizenship unless father is stateless or of unknown nationality) (A19); **Trans-Jordan** (as of 1940) (married mother can never pass citizenship) (A11); **Trinidad and Tobago** (as of 2010) (married mother cannot pass citizenship to child born abroad) (A19); **Tunisia** (as of 2010) (married mother cannot pass citizenship unless father is stateless or of unknown nationality) (A20); **United Arab Emirates** (as of 2010) (married mother can never pass citizenship) (A20); the **United Kingdom** and the countries following its law (as of 1940) (married mother cannot pass citizenship to child born abroad) (A20); **Venezuela** (as of 1940) (married mother cannot pass citizenship to child born abroad) (A21); and **Yemen** (as of 2010) (married mother cannot pass citizenship unless child is born in country and father is stateless) (A21).

In each of these countries the child of a U.S. father and a local mother will be stateless unless the U.S. father can fulfill the residence burdens in the Statute at Issue, while the child of a U.S. mother

and a local father will not be stateless: The child in that situation will take the local father's nationality. We are not aware of any countries having the opposite rule—i.e., not permitting their male nationals to pass their citizenship to a child born in a marriage to a foreign national, despite the fact that they do permit their female nationals to pass their citizenship to a child born in a marriage to a foreign national. Therefore, the risk of parenting stateless children abroad was and is much greater for married U.S. fathers than for married U.S. mothers.

If, as the government argues, the residence burdens in the Statute at Issue were designed to account for differential risks to U.S. fathers and U.S. mothers of parenting stateless children, or that those different residence burdens account for such a statelessness differential today, then the Statute at Issue should have had, and should now have, a lesser residence burden for married U.S. fathers having children abroad than for married U.S. mothers. That the Statute at Issue does not do so indicates that residence burdens were not designed to minimize, nor do they now have the effect of minimizing, the risk that children born abroad to U.S. parents will be rendered stateless.

CONCLUSION

There is no support for the government's assertion that the risk of statelessness for non-marital children of U.S. mothers was or is much higher than for U.S. fathers of non-marital children born abroad, or indeed any higher at all. It bears recalling that the discriminatory residence requirements in the Statute at Issue apply to U.S. fathers who establish paternity and commit to supporting their children financially. There is a more than reasonable possibility that the residence burdens imposed upon U.S. fathers by the Statute at Issue increased, and continue to increase, the incidence of statelessness for children born abroad of parents one of whom was or is a U.S. citizen. The judgment below should be reversed.

June 24, 2010

Respectfully submitted,

/s/

Max Gitter*
Matthew C. Vogele
Rishi N. Zutshi
Lisa M. Gouldy
Ebunoluwa A. Taiwo
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2610
mgitter@cgsh.com

Counsel for Amici Curiae
* *Counsel of Record*

APPENDIX

APPENDIX OF FOREIGN LAWS

1. Key to Secondary Sources Cited

- Acquisition and Loss of Nationality, Policies and Trends in 15 European States, Vol. 2: Country Analyses (Rainer Bauböck, Eva Ersbøll, Kees Groenedijk & Harald Waldrauch eds., 2007) [hereinafter "Bauböck 2007"].
- Alfred M. Boll, Multiple Nationality and International Law (2007) [hereinafter "Boll"].
- Julia Breslin & Toby Jones, "Qatar," in Women's Rights in the Middle East and North Africa 397 (Sanja Kelly & Julia Breslin eds., 2010), available at http://freedomhouse.org/uploads/specialreports/womensrights/2010/womensrights2010.pdf [hereinafter "Breslin"].
- Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, 2009 Human Rights Report: Qatar (Mar. 11, 2010), available at http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136078.htm [hereinafter "State Department Qatar"].
- Citizenship Policies in the New Europe (Rainer Bauböck, Bernhard Perchinig & Wiebke Sievers eds., expanded & updated ed. 2009) [hereinafter "Bauböck 2009"].
- The Civil Code of Iran (Mostafa Shahabi trans., 2007) [hereinafter "Shahabi"].

- A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties (Richard W. Flournoy, Jr. & Manley O. Hudson eds., 1929) [hereinafter "Flournoy"].
- Comm. on the Elimination of Discrimination against Women, Combined Initial and Second Periodic Reports of States Parties: Bahrain, U.N. Doc. CEDAW/C/BHR/2 (Nov. 12, 2007), available at http://www.unhcr.org/refworld/country,,,STATEPARTIESREP,BHR,,47ea235f2,0.html [hereinafter "CEDAW Bahrain"].
- Comm. on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Libyan Arab Jamahiriya, U.N. Doc. CEDAW/C/LBY/CO/5 (Feb. 6, 2009), available at http://www.universalhumanrightsindex.org/documents/826/1482/document/en/text.html [hereinafter "CEDAW Libya"].
- Comm. on the Elimination of Discrimination against Women, Initial Periodic Report of States Parties: United Arab Emirates, U.N. Doc. CEDAW/C/ARE/1 (Sept. 17, 2008), available at http://www.unhcr.org/refworld/publisher,CEDAW,STATEPARTIESREP,ARE,4970841f2,0.html [hereinafter "CEDAW UAE"].
- Comm. on the Elimination of Racial Discrimination, Initial Periodic Report of States Parties due in 2004: Oman, U.N. Doc. CERD/C/OMN/1 (Apr. 25, 2006) [hereinafter "CERD Oman"].

- Comm. on the Rights of the Child, Consideration of Reports Submitted By States Parties Under Article 44 of the Convention, Concluding Observations: Libyan Arab Jamahiriya, U.N. Doc. CRC/C/15/Add.209 (July 4, 2003), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.209.En?OpenDocument [hereinafter "CRC Libya"].
- Div. for the Dev. and Codification of Int'l Law, U.N. Legal Dep't, Laws Concerning Nationality, U.N. Doc. ST/LEG/SER.B/4, U.N. Sales No. 54.V.1 (1954) [hereinafter "Laws Concerning Nationality"].
- Laurie Fransman, British Nationality Law (2d ed. 1998) [hereinafter "Fransman"].
- J. Mervyn Jones, British Nationality Law and Practice (1947) [hereinafter "Jones"].
- Bronwen Manby, Open Society Inst., Citizenship Law in Africa: A Comparative Study (2009), available at http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/citizenship_20091009/a_citizenship_20091009.pdf [hereinafter "Manby"].
- Nationality and International Law in Asian Perspective (Ko Swan Sik ed., 1990) [hereinafter "Sik"].
- Gianluca P. Parolin, Citizenship in the Arab World (2009) [hereinafter "Parolin"].

II. Country by Country Citations

AFGHANISTAN

- Afghan Nationality Law of November 8, 1936, ch. I, arts. 2, 4, 5, 11-12, reprinted in Laws Concerning Nationality at 1-4.

ANDORRA

- Décret du 17 Juin 1939, June 17, 1939, arts. I-II, VI (Andorra), reprinted in Laws Concerning Nationality at 9-10.

AUSTRALIA

- Nationality Act, 1920-1925, § 6 (Austl.), reprinted in Flournoy at 88-103, discussed in Jones at 270.

AUSTRIA

- Law of Nationality of July 22, 1913, RGBl. 46 at 583, §§ 4-6, 17 (Germany), reprinted in Flournoy at 306-13, discussed in Bauböck 2007 at 24.

BAHRAIN

- Bahraini Citizenship Act, Sept. 16, 1963, arts. 4-5 (as amended 1981), available at http://www.unhcr.org/refworld/docid/3fb9f34f4.html.
- CEDAW Bahrain ¶ 78 (discussing the Bahraini Citizenship Act as amended through 1989).

BELGIUM

- Arrêté Royal du 14 Décembre 1932 Portant Coordination Des Lois Sur L'Acquisition, La Perte et le Recouvrement de la Nationalité, Dec. 14, 1932, arts. 1, 6-10 (Belg.), reprinted in Laws Concerning Nationality at 37-43, discussed in Bauböck 2007 at 69.

BHUTAN

- Bhutan Citizenship Act, 1985, June 10, 1985, available at http://www.nab.gov.bt/downloadsact/Eng58.pdf.

BRAZIL

- Constituição da República dos Estados Unidos do Brasil (de 24 de fevereiro de 1891) [Constitution of the Republic of the United States of Brazil of 24 of February of 1891], arts. 69, 71 (Braz.), reprinted in Flournoy at 48-49.
- Decreto No. 6948, de 14 de maio de 1908, art. 1 (Braz.), reprinted in Flournoy at 54-58.

BRUNEI

- Brunei Nationality Act, 1984 ed., ch. 15, art. 4(1) (as amended 2002), available at http://www.agc.gov.bn:81/images/LOB/PDF/Cap15.pdf.

BULGARIA

- Constitution of the Republic of Bulgaria, July 13, 1991, ch. 2, art. 25(1) (amended Sept. 26, 2003), available at http://www.unhcr.org/

refworld/docid/3ae6b53214.html, discussed in Bauböck 2009 at 220, 222.

- Law for the Bulgarian Citizenship, Nov. 5, 1998, ch. II, art. 10 (last amended Dec. 2007), available at http://www.unhcr.org/refworld/docid/49622ef32.html, discussed in Bauböck 2009 at 222.

BURMA (Myanmar)

- The Pyithu Hluttaw Law No. 4 of 1982 [Burma Citizenship Law], Oct. 15, 1982, ch. II, arts. 5-7, available at http://www.unhcr.org/refworld/docid/3ae6b4f71b.html.

CAMEROON

- Loi n° 1968-LF-3 du 11 juin 1968, Portant code de la nationalité camerounaise, July 15, 1968, §§ 6-8, 1968-LF-3 (Cameroon), available at http://www.unhcr.org/refworld/docid/3ae6b4d734.html.

CANADA

- Canadian Nationals Act of 1921, R.S.C., ch. 21 (1927) (in effect in 1940), reprinted in Flournoy at 86-87.

- Citizenship Act, R.S.C., ch. C-29, pt. I, § 3 (1985), as amended by An Act to Amend the Citizenship Act, S.C., ch. 14 (2008) (in effect in 2010) (Can.), available at http://laws-lois.justice.gc.ca/PDF/Statute/C/C-29.pdf.

CEYLON (Sri Lanka)

- Citizenship Act, No. 18 of 21 September 1948, §§ 4, 5, 9, as amended by Citizenship Amendment Act, No. 40 of 1950 (Ceylon), reprinted in Laws Concerning Nationality at 83-91.

CHINA

- Nationality Act of 5 February 1929, chs. 1-3 (in force until 1949) (China), reprinted in Laws Concerning Nationality at 94-97.

EGYPT

- Decree Law No. 19, of February 27, 1929 (Egypt), reprinted in Flournoy at 225-30.

EL SALVADOR

- Constitution of August 13, 1886, tit. III, art. 42 (El Sal.), reprinted in Flournoy at 516-18.
- Law of April 3, 1900 (El Sal.), reprinted in Flournoy at 518-21.

ESTONIA

- Citizenship Act, Jan. 19, 1995 (last amended June 2006) (Est.), available at http://www.unhcr.org/refworld/docid/4933ce4c2.html.

FINLAND

- Constitution of July 17, 1919, art. 4 (Fin.), reprinted in Flournoy at 237, discussed in Bauböck 2007 at 154.

- Law of June 17, 1927 Regarding the Loss of Finnish Citizenship, art. 2 (Fin.), reprinted in Flournoy at 239-40, discussed in Bauböck 2007 at 154.

FRANCE

- Code civil, arts. 18 to 19-1 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#Section%201%20%20Of%20French%20Persons%20by%20Parentage.

GERMANY

- Law of Nationality of July 22, 1913, RGBl. 46 at 583, §§ 4-6, 17 (Germany), reprinted in Flournoy at 306-13, discussed in Bauböck 2007 at 24.

GREECE

- Nomos (2004:3284) Kodikas Ellenikes Ithageneias [Code of Greek Citizenship], Ephemeris tes Kyvernesos tes Hellenikes Demokratias [EKED] 2004, A:217, art. 1(2) (Greece), available at http://eudo-citizenship.eu/NationalDB/docs/GRE%20Law%203284%202004%20%28English%29.pdf, discussed in Bauböck 2007 at 265.

GUATEMALA

- Constitution of 1879, arts. 4-7 (as amended in 1927) (Guat.), reprinted in Flournoy at 321-22.

- Law of February 21, 1894, tits. I, VII (Guat.), reprinted in Flournoy at 322-24.

GUINEA

- Code civil, Feb. 16, 1983, arts. 31, 40 (Guinea), available at http://www.unhcr.org/refworld/docid/3ae6b4e88.html.

INDIA

- The Citizenship Act, No. 57 of 1955, §§ 3-4; India Code (1993), v.2, available at http://www.unhcr.org/refworld/docid/3ae6b57b8.html, as explained in Sik at 79 n.55.
- Sik at 69-70 (explaining applicability of U.K. law in 1940); Jones at 114, 232-35, 286-87 (same).

INDONESIA

- Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia, arts. 1, 3 (Indon.), reprinted in Laws Concerning Nationality at 230-34, discussed in Sik at 34-35 (explaining law's applicability on federal level was unclear between 1949 and 1958 and was applied on a local level).

IRAN

- Qanun i Madani [Civil Code], May 23, 1928, art. 976 (in effect in 1940 and in 2010) (Iran), translated in Shahabi at 113-14.
- Law on the Determination of Nationality of Children Born as a Result of Marriage of Iranian Women to Foreign Men of 2006 (in

effect in 2010) (Iran), translated in Shahabi at 113 n.55.

IRAQ

- Nationality Law of October 9, 1924, arts. 8-9 (in effect in 1940) (Iraq), reprinted in Laws Concerning Nationality at 241-42.
- Law No. (46) of 1963 – Iraqi Nationality, art. 4 (in effect until 2005), available at http://www.unhcr.org/refworld/docid/3ae6b4ec38.html.
- Iraqi Nationality Law, Law 26 of 2006, Mar. 7, 2006, art. 4 (in effect in 2010), available at www.unhcr.org/refworld/docid/4b1e364c2.html.

IRELAND

- Irish Nationality and Citizenship Act, 1935 (Act. No. 13/1935), §§ 2(1)-2(2), reprinted in Jones at 338-60, discussed in Bauböck 2007 at 295.

ISRAEL

- Nationality Law, 5712-1952, art. 46, LSI 50 (1951-52) (through 1980 amendments; art. 4 in effect in 2010) (Isr.), available at http://www.unhcr.org/refworld/docid/3ae6b4ec20.html

ITALY

- Nationality Act of 13 June 1912, art. 1, Racc. Uff. 555 (Italy), reprinted in Laws Concerning Nationality at 267-71.

JAPAN

- Law No. 66 of 1899 (last amended 1924) (Japan), reprinted in Flournoy at 382-86.
- Nationality Law, Act No. 147 of 1950 (Japan), reprinted in Laws Concerning Nationality at 271-73.

JORDAN

- Revised Draft of Trans-Jordan Nationality Law of 1 May 1928, art. 6 (in effect in 1940) (Trans-Jordan), reprinted in Laws Concerning Nationality at 274-76.
- Law No. 6 of 1954 on Nationality, Jan. 1, 1954, art. 3 (last amended 1987) (in effect in 2010) (Jordan), available at http://www.unhcr.org/refworld/docid/3ae6b4ea13.html.

KENYA

- Constitution, § 90 (2001) (Kenya), available at http://www.unhcr.org/refworld/docid/47162cfc2.html.

KIRIBATI

- Constitution of Kiribati, 1979, ch. III, available at http://www.parliament.gov.ki/constitution.html.

KOREA

- Nationality Law No. 16 of 20 December 1948 (Korea), reprinted in Laws Concerning Nationality at 280-83.

KUWAIT

- Nationality Law, 1959, arts. 2-3, 5 (Kuwait), available at http://www.unhcr.org/refworld/docid/3ae6b4cf1c.html.

LEBANON

- Legislative Decree 15 of 19 Jan 1925 (nationality), arts. 1-2 (Leb.), available at http://www.unhcr.org/refworld/docid/44a24c6c4.html.

LIBERIA

- Law of February 8, 1922, § 67 (Liber.), reprinted in Flournoy at 413-15.

LIBYA

- Law No. 1013, of June 26, 1927 Regarding Italian Lybian Citizenship, art. 29 (in effect in 1940) (Italian Lybia/Libya), reprinted in Flournoy at 379-80.
- Nationality Law 17 of 1954; Law No. 18 of 1980 pertaining to the resolutions of the Nationality Act; Regulatory Code for Law No. 18 of 1980 pertaining to the resolutions of the Nationality Act (in effect in 2010) (Libya), discussed in Manby at 45, 46, 98; discussed in CRC Libya ¶¶ 31-32; discussed in CEDAW Libya ¶ 17.

LITHUANIA

- Law on Citizenship, Dec. 11, 1991 (Lith.), available at http://www.unhcr.org/refworld/docid/3ae6b4f110.html.

LUXEMBOURG

- Loi du 9 Mars 1940 sur L'Indigénat Luxembourgeois, Mar. 9, 1940, art. 1(1) (Lux.), reprinted in Laws Concerning Nationality at 298-307.

MALAYSIA

- Constitution of Malaysia, 1957, pt. III, sched. 2 (as amended 1995), available at http://www.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Malaysia/malaysia.pdf, as explained in Boll at 453-55.

MAURITANIA

- Loi N° 1961-112, Loi portant code de la nationalité mauritanienne, June 13, 1961, art. 13 (Mauritania), available at http://www.unhcr.org/refworld/docid/3ae6b5304.html.

MEXICO

- Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States], art. 30, as amended 1934, Diaro Oficial de la Federación, 5 de Febrero de 1917 (Mex.), reprinted in Laws Concerning Nationality at 307.

MONACO

- Code civil art. 8, as amended by Ordonnance Sur la Nationalité du 13 Avril 1911, Apr. 13, 1911, art. 1 (Monaco), reprinted in Laws Concerning Nationality at 317-19.

NEPAL

- Nepalese Citizenship Act 2009 V.S., 1952 (Nepal), reprinted in Laws Concerning Nationality at 320-21.
- Nepal Citizenship Act 2063 (2006 A.D.), Nov. 26, 2006, cls. 3, 5, available at http://www.britishcitizen.info/NCA2006.pdf.
- The Interim Constitution of Nepal, 2063, 2007, available at http://www.ccd.org.np/new/resources/interim.pdf.

THE NETHERLANDS
(including Aruba and Suriname in 1940)

- Compare 1892 Dutch Nationality Act, arts. 1-2 (as amended 1920) (Neth.), reprinted in Flournoy at 440-46, and 1892 Dutch Nationality Act, arts. 1-2 (as amended 1947) (Neth.), reprinted in Laws Concerning Nationality at 321-26, discussed in Bauböck 2007 at 393-95,

NEW ZEALAND

- British Nationality and Status of Aliens (in New Zealand) Act, 1928, 19 Geo. 5, c. 58, § 6, sched. 2, reprinted in Flournoy at 104-15, discussed in Jones at 270-71.

NORWAY

- Law of August 8, 1924 Relating to Norwegian Nationality, § 1, reprinted in Flournoy at 453-57, discussed in Grete Brochmann, EUDO Citizenship Observatory, Country Report: Norway 2 (2010), available at http://eudo-citizenship.eu/docs/CountryReports/Norway.pdf.

OMAN

- Omani Nationality Law No. 3/83 (as amended), 1983, art. 1, discussed in CERD Oman at 16.

PAKISTAN

- Pakistan Citizenship Act, No. II, of 13 April 1951, ¶ 5, reprinted in Laws Concerning Nationality at 361-66.
- Sik at 69-70 (explaining applicability of U.K. law in 1940); Jones at 114, 232 35, 286-87 (same).

THE PHILIPPINES

- Const. (1935), Art. IV (Phil.), available at http://www.gov.ph/aboutphil/uploads/1935constitution.doc, explained in Sik at 359 60.

POLAND

- Law of January 20, 1920, arts. 5, 6, 1920 r. DZ. U. Nr 7, poz. 44 (Pol.), reprinted in Flournoy at 479-82, discussed in Bauböck 2009 at 124, 146 n.4.

PORTUGAL

- Portuguese Nationality Act, Law 37/81, Oct. 3, 1981, art. 1(f), last amended by Organic Law 2/2006 of Apr. 17, 2006, available at http://eudocitizenship.eu/NationalDB/docs/POR%20Law%2037%2081%20as%20consolidated%20by%20Law%202%2006%20(English).pdf, discussed in Nuno Piçarra & Ana Rita Gil, EUDO Citizenship Observatory, Country Report: Portugal 15-16 (2010), available at http://eudo-citizenship.eu/docs/CountryReports/Portugal.pdf.

QATAR

- Qatari Citizenship Act No. 38 of 2005, arts. 1-2, discussed in Parolin at 96-100; discussed in Breslin at 400; discussed in State Department Qatar.

ROMANIA

- Law of February 23, 1924, arts. 2, 36(b) (Rom.), reprinted in Flournoy at 497-508, discussed in Bauböck 2009 at 180-81 (noting that although a new citizenship law was passed in 1939 it "did not alter the main principles of ascribing citizenship").

SAUDI ARABIA

- Nationality Ordinance of 5 December 1938, Royal Decree No. 7/1/47, arts. 6-7 (in effect in 1940) (Saudi Arabia), reprinted in Laws Concerning Nationality at 399-402.

- Saudi Arabian Nationality Regulations, Council of Ministers Res. No. (4), 25/1/1374 (Sept. 23, 1954), arts. 7-8, as amended by Res. No. 210, 7/11/1379 (1959) (in effect in 2010), available at http://www.unhcr.org/refworld/docid/3fb9eb6d2.html, discussed in Parolin at 96-100.

SENEGAL

- Loi n° 61-70 du 7 mars 1961, Code de la nationalité sénégalaise, Mar. 15, 1961, arts. 5, 8-9 (amended in 1989) (Sen.), available at http://www.unhcr.org/refworld/docid/46cebc2e2.html.

SOMALIA

- Transitional Federal Charter for the Somali Republic, Feb. 2004, art. 10, available at http://www.unhcr.org/refworld/docid/4795c2d22.html.

SOUTH AFRICA

- Act No. 40, of November 11, 1927, ch. 1 (S. Afr.), reprinted in Flournoy at 127-29.

SUDAN

- Sudanese Nationality Act 1957, § 5 (last amended 1974), available at http://www.unhcr.org/refworld/docid/3ae6b56718.html.
- Nationality Act, 2003, Dec. 31, 2003, § 5 (Sudan), available at http://www.unhcr.org/refworld/docid/469e24992.html.

SURINAME

- Law on Nationality and Residence, State Ordinance of 24 November 1975 for the Regulation of the Surinamese Nationality and Residence in Suriname, Nov. 25, 1975 (last amended 1989), available at http://www.unhcr.org/refworld/docid/3ae6b50714.html.

SWAZILAND

- Citizenships Order, 1974, Apr. 12, 1973, §§ 4-5 (Swaz.), available at http://www.unhcr.org/refworld/docid/3ae6b4fa20.html.
- Constitution of the Kingdom of Swaziland Act 2005, ch. 4, § 43, available at http://aceproject.org/ero-en/regions/africa/SZ/CONSTITUTION%20OF%20THE%20KINGDOM%20OF%20SWAZILAND%202005.pdf.

SWEDEN

- 1 art. Law No. 130 of May 23, 1924 Respecting the Acquisition and the Loss of Citizenship (Juristtdnings Lagsamling 1924:30) (Swed.), reprinted in Flournoy at 545-50, discussed in Baubock 2007 at 521-22.

SYRIA

- Order No. 16/S of January 19, 1925, art. 1(2) (in effect in 1940) (Syria), reprinted in Flournoy at 301-02.
- Nationality Act, Dec. No. 276/1969, art. 3, Nov. 24, 1969 (in effect in 2010) (Syria), available at http://www.unhcr.org/refworld/

docid/3ae6b56b10.html, discussed in Parolin at 96-99.

TAIWAN

- Nationality Act of 5 February 1929, chs. 1-3 (in force in China pre-1949, in force solely in Taiwan post-1949) (Taiwan), reprinted in Laws Concerning Nationality at 94-97, explained in Sik at 35-40.

THAILAND

- NATIONALITY ACT, B.E. 2456 (1913) (Thail.), explained in Sik at 463-64.
- NATIONALITY ACT, B.E. 2495 (1952), ch. 2 (Thail.), reprinted in Laws Concerning Nationality at 455-58.

TOGO

- Loi sur la nationalité togolaise, Sept. 11, 1978, art. 3 (Togo), available at http://www.unhcr.org/refworld/docid/3ae6b4d02c.html, discussed in Manby at 5.

TRINIDAD AND TOBAGO

- Citizenship Act of the Republic of Trinidad and Tobago, July 31, 1976, available at http://www.unhcr.org/refworld/docid/3ae6b4d028.html.
- Constitution of the Republic of Trinidad and Tobago, Aug. 1, 1976, available at http://www.unhcr.org/refworld/docid/3ae6b59f54.html.

TUNISIA

- Code de la nationalité tunisienne, Apr. 22, 1963, art. 6 (amended 1984) (Tunisia), available at http://www.imldb.iom.int/viewDocument.do?id={4AA741DF-0C37-42E8-8E39-E8B3444300CE}.

UNITED ARAB EMIRATES

- Federal Act No. 17 of 1972, arts. 2, 17 (U.A.E.), discussed in CEDAW UAE at 39.

UNITED KINGDOM [Including the colonies and territories in 1940 which now comprise the Bahamas, Barbados, Belize, Bermuda, Botswana, British Virgin Islands, Cayman Islands, Gambia, Ghana, Guyana, Hong Kong, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Nigeria, Palestine, Seychelles, Sierra Leone, Singapore, Sudan, Swaziland, Tanzania, Trinidad and Tobago, Uganda, Zambia, and Zimbabwe]

- Nationality & Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17, § 1 (U.K.), reprinted in Flournoy at 61-72, discussed in Jones at 113-57.

- Jones at 114, 232-35, 268-87 (discussing application of British Nationality & Status of Aliens Act to British Commonwealth colonies and territories); see also Fransman at 467-993 (discussing the colonial status of each of the British Commonwealth colonies and territories).

VENEZUELA

- Civil Code of July 13, 1922 (Venez.), reprinted in Flournoy at 640-41.
- Constitution of May 29, 1929, ch. 2 (Venez.), reprinted in Flournoy at 640.

VIETNAM

- Code civil du Tonkin de 1931 (Vietnam), reprinted in Laws Concerning Nationality at 549-50.

YEMEN

- Law No. 6 of 1990 Concerning Yemeni Nationality, arts. 3-4, available at http://www.yemenembassy.org/consulate/nationality.htm (in effect in 2010).